M E M O R A N D U M

To: Members, ATILS ABS-MDP Subcommittee
From: Randall Difuntorum, ATILS Staff
Date: March 26, 2019
Re: ATILS – ABS Comparative Models Tables

Attachments:

1. ABS Comparative Model Tables
2. Selected Articles from the ATILS Dropbox

Given the apparent growing consensus on ATILS to consider an entity regulation model, it is time to consider the issue of non-lawyer ownership. Attached are ABS Comparative Model Tables and some helpful articles on the implementation of ABS in various jurisdictions. As there are sixteen jurisdictions included, for ease of viewing the information is broken into two tables. The first table addresses: Australia; Denmark; England & Wales; Germany; Italy; New Zealand; Scotland; Singapore; and Spain. The second table addresses: the District of Columbia; Washington State; Belgium; Canada; France; Netherlands; and Poland. In addition, a link to a recent article is provided below.

https://www.lawgazette.co.uk/features/new-model-armies/5065393.article

ATILS ABS Comparative Model Table #1

Executive Summary: To facilitate the task force's consideration of alternative business structures (ABS), this table offers a comparative landscape of ABS models currently permitted in other jurisdictions. Primary categories of ABS models include nonlawyer owndership interests, nonlawyer external investments, mutidisciplinary practice, or incorpated legal practice. Descriptions of adopted ABS in each jurisdiction are provided in this table along with codified authorities and assigned primary regulators that govern the activities.

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	Australia (States: New South Wales and Victoria)	Denmark	England & Wales	Germany	Italy	New Zealand	Scotland	Singapore	Spain
Nonlawyers are Permitted to Hold Certain Percentage Ownership Interests in Law Firms	Yes.	Nonlawyer ownership is limited to those who work in the firm and at most 10%.	Nonlawyer ownership is limited to those who pass "fit-to-own" test. No set percentage stated. Entities must be licensed.	Yes, limited liability companies are allowed between lawyers and members of specific professions: tax agents, auditors and certified accountants, where majority of the shares and voting rights must be held by the lawyers.	33%	Nonlawyer owners must be relatives of the actively involved lawyers (or a qualifying trust) and are only permitted to own non-voting shares	Permissible in accordance to the Law Society Rules, but separate conditions are not prescribed. *Statutes have been amended as of 2012 that omitted the term MDP and the rule on this form of practice is ambiguous.	25%	Yes
Permitted Nonlawyer Investments (passive or only to the extent of being active in the business)	Yes.	No.	No limit on financial involvement or ownership %	No; no third party ownership of shares and profit. Shares cannot be held in a third parties' account.	No	No	"External investors can have no more than 49% ownership or control over a licensed legal service provider." 51% ownership includes solicitors and a member of another regulated profession.	No	25% external ownership- can be non-regulated entities or individuals. 75% ownership include members and regulated professionals.
Operate as a multidisciplinary practice (MDP), which can provide non-legal services in addition to legal services	Yes. In Australia, MDP is a partnership between a lawyer and a nonlawyer for a business that offers legal services as well as other services. "Solicitors are permitted to conduct other business as long as the public are not deceived and appropriate filing and confidentiality is maintained (Rule 8, Legal Profession Uniform Legal Practice (Solicitors) Rules 2015). A solicitor can practise under any business structure (section 32, Legal Profession Uniform Law)."	No.	England & Wales- MDPs may provide only legal or legal with nonlegal services. Allows nonlawyer managers and owners.	Yes, various forms. Only incorporated limited liability companies require lawyers hold a majority, but does not apply all law firms. (See Alternative legal service providers in link.)	No	No	Yes	No	"Professional services firms can be multidisciplinary, as long as all services provided by the firm are regulated professional activities and share a common objective. Commentators have interpreted this as meaning that the different professional activity
ABS Model Establishes Incorporated Legal Practices (ILP)	Yes. In Australia, ILP can be listed in Stock Exchange and have external (nonlawyer) investors. ILPs have to comply with the Australian Federal Corporations Act as well as the Uniform Law. "The Uniform Law uses principles and includes regulatory objectives for the profession, extending the framework for regulating ILPs to all law firms." Prior requirement for approprioate management system (AMS) is only required if a regulator determines it is needed.	No.	Yes.	No. No external investment allowed.	No	No	Yes- external ownership allowed at a certain percentage.	No	No

ATILS ABS Comparative Model Table #1

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	Australia (States: New South Wales and Victoria)	Denmark	England & Wales	Germany	Italy	New Zealand	Scotland	Singapore	Spain
Primary Regulators	Legal Services Council for Uniform Law; Office of Legal Services Commissioner (OLSC) to handle complaints under the Uniform Law in NSW New South Wales: Legal Services Council for Uniform Law; Office of Legal Services Commissioner (OLSC) to handle complaints under the Uniform Law Victoria: Victorian Legal Services Board and Commissioner		SRA (Solicitors Regulation Authority) and CLC (Council for Licensed Conveyancers) both "regulate firms within which different types of lawyers work." LSB (Legal Services Board) oversees regulation of all lawyers in England and Wales. ICA (Institute of Chartered Accountants) approved regulator of ABS for probate services. Solicitors Regulation Authority (SRA) Council for Licensed Conveyancers (CLC) Legal Services Board (also, see link for a complete list of approved regulators, including ICA)	See Below Federal German Bar Association (Bundesrechtsanwaltskammer)	Council of the Bar Association of Rome Ordine Degli Avvocati di Milano, Milan		Three-tiered: Scottish Government approves and licenses "approved regulators"; approved regulators licenses and regulates "licensed providers"; and the licensed providers manage and oversee the individuals in the entity. (Law Society of Scottland currently trying to obtain regulatory authority from the Scottish Government.) Scottish Government (Law Society of Scotland in the process of applying to become a regulatory authority over ILPs and MDP through the Scottish Government)		Yes Provincial bar associations
Codified Laws or Rules	Uniform Law Australian Federal Corporations Act (for ILP) Legal Profession Uniform General Rules 2015 (Victoria follows New South Wales general rules): https://www.legislation.nsw.gov.au/#/view/regulation/2015/246	Code of Conduct for Danish Bar and Law Society **Report: "Competition and Regulation of the Legal Sector in Denmark"	SRA Standards and Regulations	Rules of Professional Practice (Berufsordnung für Rechtsanwälte) §§ 59c, 59e, and 59f BRAO (German Federal Lawyer's Act)	Code of Conduct for Italian Lawyers		Legal Services (Scotland) Act 2010 (Ch. 2- Licensed Legal Services Providers) Law Society of Scotland Rules License Legal Service Providers *Note: The Legal Services (Scotland) Act 2010 aims to allow solicitors to provide legal services via a range of different business models which are currently prohibited - such as allowing non-solicitor partners, working in partnership with other professionals (MDPs), and external ownership. The Act, introduced as a Bill on 9/30/09, is permissive rather than prescriptive legislation to allow increased choice for those running law firms. Traditionally structured solicitor practices will remain.		Code of Conduct of the Spanish Bar (CD- Código Deontológico de la Abogacía Española)

ATILS ABS Comparative Model Table #2

Executive Summary: To facilitate the task force's consideration of alternative business structures (ABS), this table offers a comparative landscape of ABS models currently permitted in other jurisdictions. Primary categories of ABS models include nonlawyer owndership interests, nonlawyer external investments, mutidisciplinary practice, or incorpated legal practice. Descriptions of adopted ABS in each jurisdiction are provided in this table along with codified authorities and assigned primary regulators that govern the activities.

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	D.C	WA	Belgium	Canada (Provinces: Ontario, British Columbia, and Quebec)	France	Netherlands	Poland
Nonlawyers are Permitted to Hold Certain Percentage Ownership Interests in Law Firms	No limit on financial involvement or ownership %	Limited to Limited License Legal Technician (LLLT) and Limited Practice Officer (LPO)	No	Ontario- lawyer-control required; no set percentage. British Columbia- same as Ontario. Quebec- lawyer majority ownership, no set percentage.	No	No	No
Permitted Nonlawyer Investments (passive or only to the extent of being active in the business)	No. D.C. does not permit external investors, who do not perform professional services within the law firm, to own all or part of the ownership. (D.C. RPC Rule 5.4 Comment [8].)	Not permitted.	No	Not permitted.	Yes, only if law firm is created in the form of a societe d'exercice liberal (SEL). Those who can invest are: either a natural or legal person practicing the same discipline as that of the SEL; or people who have ceased to practice the discipline fo the SEL, but for a period of no longer than 10 years; or legatees or heirs of the persons mentioned above; or of SPFPL (multi-discipline equity structures, "where equities from two or more firms could create a capital structure.").	No	No
Operate as a multidisciplinary practice (MDP), which can provide non-legal services in addition to legal services	No. Nonlawyers' professional services has to be in assistance to the legal service, and the partnership has to be for the sole purpose of providing legal services. (D.C. RPC Rule 5.4(b)(1) and Comment [7].) This structure differs from other forms of MDPs in a way that this rule intends to allow non-legal services professionals to be employees of the firm and hold managerial position, while providing services that support legal services at the firm. However, it is not an individual professional service alongside legal services as in other types of MDPs.	Yes. LLLT and LPO are permitted.	"Only the Council of the Ordre National can determine with which other liberal professions lawyers can associate in Belgium." Flemish Belgian Bar does not permit MDPs, although it does permit Flemish lawyers to incorporate with firms outside the Flemish territorial jurisdiction if it's permitted in the foreign jurisdiction. (Flemish Bar Council Code of Ethics for Lawyers Rule 171.5.) French Section of the Brussels Bar permits "sharing premises and equipment," but "integrated professional practices are expressly forbidden." ("Multidisciplinary Practices and Partnerships..." by Stephen J. McGerry.)	**Ontario**- yes with "effective control" (ensures the MDP is in "compliance with the core values…of the legal profession."), and nonlawyers have to supplement the practice of law. **British Columbia**- yes with effective control and nonlaywers have to supplement the practice of law (Law Society Rule 2-40(2)(1)(a)(i)). **Quebec**- yes; lawyers need to have majority ownership and nonlawyers must be members of identified professional bodies. Nonlaywers do NOT have to supplement the practice of law in Quebec.	Limited to only the accounting and legal professions, and does not permit "non-liberal professions," ie. auditors and financial advisors, to associate with lawyers. Cooperation permitted "with members of regulated professions for sharing office space," but use of the same name and sharing of costs permitted.	Yes (various forms)	Yes (various forms)
ABS Model Establishes Incorporated Legal Practices (ILP)	No	No	No	Not permitted.	No	No	No

ATILS ABS Comparative Model Table #2

Implemented Models of Alternative Business Structures (ABS*) in Other Jurisdictions	D.C	WA	Belgium	Canada (Provinces: Ontario, British Columbia, and Quebec)	France	Netherlands	Poland
Primary Regulators	D.C. Bar	Washington State Bar Association. (Administers attorney regulation on behalf of the Washington State Court.)	Dutch Brussels Bar	CBA (Canadian Bar Association) imposed the rules in the above jurisdictions but has no regulatory function. Law Society of Onario, Law Society of British Columbia, and Le Barreau du Quebec handle complaints. Law Society of Ontario The Law Society of British Columbia Barreau du Québec *Only Ontario has established standards for paralegals		Netherlands Bar Association	
Codified Laws or Rules	D.C. Rules of Professional Conduct	Washington State Court Rules. Rule 19, 28, and LLLT RPC. Washing State Court Admission and Practice Rule Washington State Court Rule. Limited Practice Rule for LPO	Flemish Bar Council Code of Ethics for Lawyers French Section of the Brussels Bar- Rules of Professional Ethics (Barreau De Bruxelles Ordre Francais)	Ontario: By-Law 7 Ontario: Rules of Professional Conduct for lawyers Ontario: Rules of Professional Conduct for paralegals British Columbia: Law Society Rule 2-38 - 2-49 BC: MDP page BC: Rules of Professional Conduct Quebec: survey and research on legal profession and MDPS			

NEW YORK STATE BAR ASSOCIATION

NYSBA

Report of the Task Force on Nonlawyer Ownership

November 17, 2012

Approved by the NYSBA House of Delegates
pursuant to a resolution adopted November 17, 2012.

NYSBA

NEW YORK STATE BAR ASSOCIATION
RESOLUTION ADOPTED BY HOUSE OF DELEGATES
NOVEMBER 17, 2012

WHEREAS, in 2000 the New York State Bar Association approved a resolution from the Special Committee on the Law Governing Firm Structure and Operation that provided, *inter alia*, that "[n]o change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law"; and

WHEREAS, in December 2011 the ABA Commission on Ethics 20/20 released for comment a discussion draft proposing a limited form of nonlawyer ownership of law firms and a paper addressing the sharing of fees between or among firms with offices in jurisdictions where nonlawyer ownership is permitted; and

WHEREAS, in view of the fact that more than ten years had passed since this issue was examined by NYSBA, the Task Force on Nonlawyer Ownership was appointed to consider the nonlawyer ownership proposals, evaluate whether the proposals would advance the profession's core values of loyalty, independence and confidentiality; and

WHEREAS, in April 2012, the ABA Commission on Ethics 20/20 issued a press release indicating that it will not propose changes to ABA policy prohibiting nonlawyer ownership of law firms at this time, and thus withdrawing its December 2011 discussion draft proposing a limited form of nonlawyer ownership of law firms; and

WHEREAS, the Task Force has completed a report concluding that New York should not adopt any form of nonlawyer ownership in the absence of compelling need, empirical data or pressure for change; and

WHEREAS, in September 2012 the ABA Commission on Ethics 20/20 issued a revised paper withdrawing its December 2011 proposal concerning the division of fees within a law firm, and addressing the division of fees between lawyers in different firms where one lawyer practices in a firm in a jurisdiction that prohibits nonlawyer ownership and the other practices in a firm with nonlawyer owners in a jurisdiction that permits it (the Inter Firm Fee Sharing Proposal); and

WHEREAS, in October 2012, the ABA Commission on Ethics 20/20 issued a press release indicating that it will not propose changes to ABA policy with regard to sharing of fees with law firms in jurisdictions that permit nonlawyer ownership, withdrawing its September 2012 discussion draft proposing an Inter Firm Fee Sharing Proposal and referring the issue to the ABA's Standing Committee on Ethics and Professional Responsibility;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association approves the report and recommendations of the Task Force on Nonlawyer Ownership; and it is further

RESOLVED, that the Association reaffirms its opposition at this time to any form of nonlawyer ownership of law firms in the absence of a sufficient demonstration that change is in the best interest of clients and society, and does not undermine or dilute the integrity of the legal profession; and it is further

RESOLVED, that the Association refers the issue of how to implement the policy behind the Inter Firm Fee Sharing Proposal to the Association's Committee on Standards of Attorney Conduct with the request that the Committee report back to the House of Delegates; and it is further

RESOLVED, that the issue of nonlawyer ownership be the subject of further study and analysis by appropriate entities of the Association; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such other and further steps as they may deem warranted to implement this resolution.

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I. Introduction

New York State, one of the world's most significant legal centers, has traditionally played a prominent role in the evolution of the law governing lawyers. In particular, New York has been influential in developing the law applicable to the structure and operation of law firms. Law firms are the vehicles through which essential legal services are provided to the public, and the integrity of their ownership and organization is indispensable to maintaining the effective delivery of those services.

At the turn of the twenty-first century, the New York State Bar Association ("NYSBA") established the MacCrate Committee and charged it with studying the existing law governing law firm structure and considering whether there was a need for any changes in the law. In 2000, that Committee issued the MacCrate Report, a seminal and expansive document that contained an appraisal of the American legal profession as of 2000 and discussed in detail nonlawyer involvement in the practice of law. The MacCrate Report opposed the adoption of a 1999 American Bar Association ("ABA") proposal that would have permitted nonlawyer ownership of law firms. NYSBA subsequently adopted a resolution that nonlawyer investment in law firms should continue to be prohibited and joined several other state bar associations in a successful effort to oppose nonlawyer ownership proposals that came before the ABA's House of Delegates.

On December 2, 2011, the ABA's Commission on Ethics 20/20 ("Ethics 20/20 Commission") released for comment a discussion draft proposing a limited form of nonlawyer ownership of law firms (the "ABA NLO Proposal"). The draft proposed to allow certain nonlawyers employed by a law firm to have a minority financial interest in the firm and share in its profits. At the same time, the Ethics 20/20 Commission issued, as an initial proposal for comment, a "conflicts of law" paper to address how to deal with sharing of fees between separate

firms (*inter firm*) or among offices of the same firm (*intra firm*) where one of the firms or offices is located in a jurisdiction where nonlawyer ownership is permissible (both *inter firm* and *intra firm* proposals are together referred to as the "ABA Conflicts of Law Proposal").[1]

In February 2012, Vincent E. Doyle III, then President of NYSBA, gave testimony at a hearing conducted by the Ethics 20/20 Commission. He tracked the history of proposals that would have allowed nonlawyer ownership in New York in particular and the U.S. generally. He observed that after extensive study and debate, our State has consistently refused to allow nonlawyer ownership in law firms. Nonetheless, in recognition of the considerable thought that the Ethics 20/20 Commission had given to the issue of nonlawyer ownership, the fact that the current proposal was more limited than the ABA's prior proposal, and that more than ten years had passed since the last ABA proposals, President Doyle announced the creation of a new Task Force on Nonlawyer Ownership ("Task Force") chaired by NYSBA Past President Stephen P. Younger.

The Task Force is comprised of leading practitioners, academics, legal ethicists, retired jurists and other attorneys representing a broad spectrum of the legal profession. It was charged with thoroughly and objectively considering the nonlawyer ownership proposals made by the Ethics 20/20 Commission, evaluating whether the proposed changes will advance the core values of the profession – loyalty, independence and confidentiality – and reporting back to NYSBA.[2]

The Task Force conducted several meetings between February and November 2012, at which it debated the merits of the Ethics 20/20 Commission's discussion draft and subsequent proposals solicited the input, views, and experiences of a variety of individuals from various

[1] Subsequent to the initial drafting of this report, the Ethics 20/20 Commission issued a revised conflicts of law proposal which withdrew its initial proposal on *intra firm* sharing of fees, but maintained its proposal on *inter firm* sharing of fees. In response, the Task Force considered this latest proposal as discussed *infra* at 28-31. Ultimately, the Ethics 20/20 Commission also withdrew its proposal on *inter firm* sharing of fees, as discussed *infra* at 31.

[2] The Report of the Task Force on Nonlawyer Ownership will be hereinafter referred to as "Task Force Report."

jurisdictions whose professional work has involved, either directly or indirectly, nonlawyer ownership issues. The list of speakers, and a summary of their presentations, is contained in Appendix A of this Task Force Report. The Task Force also reviewed an extensive collection of scholarship on the subject of nonlawyer ownership and discussed these writings at Task Force meetings. A bibliography of these writings is set out in Appendix B to this Task Force Report. To solicit the views of a broad section of attorneys licensed in New York, the Task Force also disseminated surveys to lawyers broken into three groups: Small Firm Practitioners; Large Firm Practitioners; and Corporate Counsel. The results of those surveys are summarized in this Task Force Report.

In April 2012, while the Task Force was in the middle of its work, the Ethics 20/20 Commission announced that it had decided not to continue to pursue the ABA NLO Proposal, which would have changed ABA policy prohibiting nonlawyer ownership of law firms. The Commission noted that it would, however, continue to consider how to provide practical guidance about choice of law problems that arise because some jurisdictions, including the District of Columbia and a growing number of foreign jurisdictions, permit nonlawyer ownership of law firms.

Despite the withdrawal of the ABA NLO Proposal, the Task Force decided to continue with its study and complete the charge assigned to it by President Doyle. This Task Force Report documents the Task Force's findings and recommendations.

The Task Force Report begins with a history of the debate regarding nonlawyer ownership in New York from the 1999 ABA proposals recommending such ownership up through the present. It then describes the Ethics 20/20 Commission's proposals on nonlawyer

ownership and the Task Force's mission. The Task Force Report continues with an examination of the nonlawyer ownership experience in other jurisdictions.

Next, the Task Force Report summarizes the opinions and reports of various bar associations from other jurisdictions and sections of NYSBA prepared in response to the ABA's proposals concerning nonlawyer ownership and choice of law.

Finally, this Task Force Report concludes with the Task Force's observations and recommendations on nonlawyer ownership and choice of law concerns. The Task Force observed that the absence of compelling need, empirical data, or pressure for change, combined with professionalism concerns, all militated against changing New York's position on nonlawyer ownership and against adopting either of the ABA's nonlawyer ownership proposals. As a result, the Task Forced voted to oppose adopting any form of nonlawyer ownership in New York, noting that further studies were necessary before any such change should be advocated. The Task Force also voted in opposition to adopting the ABA's proposals on choice of law, except to endorse a proposal on inter firm fee sharing.

The Committee wishes to recognize Bob Emery, Research Librarian at Albany Law School, for his invaluable research assistance throughout this project. In addition, Albany Law School students Mackenzie Keane and Jessica Clemente reviewed drafts of the Task Force Report and provided several helpful suggestions.

The opinions expressed herein are those of the Task Force preparing this Task Force Report and do not represent those of NYSBA unless and until this Task Force Report has been adopted by the Association's House of Delegates or Executive Committee.[3]

[3] The views expressed herein do not necessarily reflect the opinions of every Task Force member.

II. History of the Debate on Nonlawyer Ownership in New York

A. *The MacCrate Report Addresses Nonlawyer Investment in Law Firms*

In 1999, the ABA Commission on Multidisciplinary Practice issued a report proposing, among other things, that lawyers be permitted to form business relations with nonlawyers and to allow entities owned or controlled by nonlawyers to engage in multidisciplinary practice ("MDP") with lawyers.[4] That report was rejected by the ABA House of Delegates at the ABA's Annual Meeting on August 9-10, 1999.[5]

On June 26, 1999, NYSBA's House of Delegates adopted a resolution:

(1) opposing any changes in existing regulations prohibiting attorneys from practicing law in MDPs in the absence of a sufficient demonstration that such changes are in the best interest of clients and society and do not undermine or dilute the integrity of the delivery of legal services by the legal profession; and

(2) urging further studies of the matter.

Pursuant to this resolution, on July 28, 1999, NYSBA established a Special Committee on the Law Governing Firm Structure and Operation chaired by Past President Robert MacCrate (the "MacCrate Committee") "charging it to consider the present law and its effectiveness,

[4] ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates, Resolution (as of June 8, 1999), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html. Much of the focus of the MacCrate Report was on MDP, which is not the subject of this Report as the Ethics 20/20 Commission did not propose to revisit that issue.

[5] *See* ABA House of Delegates Resolution (1999), Reports of ABA, Volume 124, No.2, p. 14; *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/flbarrec.html.

whether there is a need for any changes in the law, the evidence in support of such changes, and whether potential advantages from such changes outweigh potential detrimental effects."[6]

Ultimately, in April 2000, the MacCrate Committee issued a seminal and expansive document entitled "Report of the NYSBA Special Committee on the Law Governing Firm Structure and Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*" (the "MacCrate Report"), in which it opposed the ABA's MDP proposal.[7] After extensive discussion of its broad study of the principal issues raised regarding the law governing lawyers and law firms in the debate over MDP, the MacCrate Report set forth recommendations as to: "(1) what should be changed in the law to clarify the place of multidisciplinary practice while preserving the core values of the American legal profession; and (2) what in the public interest should remain unchanged in the law."[8]

With regard to nonlawyer ownership of law firms, the MacCrate Report divided its recommendations into two distinct sections: 1) nonlawyer investment in law firms, and 2) nonlawyer ownership of or control over law firms.[9]

As to nonlawyer financial investment in law firms, the MacCrate Report concluded that the arguments in favor of such investment were not convincing.[10] The type of law firm most likely to benefit from outside investment—*i.e.*, smaller firms and firms facing shortfalls in revenues—"are not likely candidates for outside equity investment."[11] On the other hand, larger,

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[6] NYSBA Special Comm. on the Law Governing Firm Structure Operation, *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*, at 1 (2000) (hereinafter referred to as "MacCrate Report").
[7] *Id.* at 380, 388.
[8] *Id*. at 3.
[9] *Id*. at 377-88.
[10] *Id.*
[11] *Id.*

more prosperous law firms would likely attract outside investment but, conversely, would not need or desire this investment.[12]

The MacCrate Report's second objection was that any nonlegal entity likely to be attracted to making such an investment would be financially dominant with respect to the law firm. The Report concluded that it was reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership."[13] The Report noted that regulatory authorities in various jurisdictions have called for rules that would govern this type of affiliation "with a view to preserving the professional integrity" of this type of "'captive' legal practice."[14]

As a third objection to a nonlawyer's financial investment in a law firm, the MacCrate Report indicated that such investment would impose a duty on the principals of the firm to operate it for the "financial benefit of the investors."[15] Even without the added pressure of an outside investor, the Report noted that lawyers have, at times, unfortunately put the financial needs of their firms before a client's interest.[16] With outside investment, there would be an even greater potential for tensions to arise between legal ethics and the independence of the lawyer on the one hand, and the business plan promoted by nonlawyer investors on the others.[17] The MacCrate Report concluded that "this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system…and should not be permitted in New York."[18]

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[12] *Id.* at 378.
[13] *Id.*
[14] *Id.* at 379.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 380.
[18] *Id.*

As to nonlawyer ownership or control over law firms, the MacCrate Report reiterated that lawyers may work with nonlawyer professionals, as long as lawyers retain ultimate control over the services provided to clients.[19] According to the Report, the "nonlawyer participants in such ventures . . . do not play a role in the management of the legal practice, and only have a managerial say with respect to the nonlegal services being provided to the public."[20] The lawyers participating in such a venture, explained the Report, remain responsible for their professional and ethical conduct.[21] The Report also expressed concern that a partnership between a law firm and nonlawyer entity may be outside the scope of existing professional and ethical rules.[22] While acknowledging that effective rules could ultimately develop to govern such partnerships, the MacCrate Report urged "the greatest caution" toward any relationship structured in a manner permitting a "dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics."[23]

The MacCrate Report cited several arguments for allowing lawyers to form general partnerships with nonlawyers. Chief among these was that "consumers should have the right to choose the form of the entity that provides legal services to them."[24] The Report explained that some who favored permitting lawyers to form general partnerships with nonlawyers contended that consumers should have the ability to waive the traditional protections of confidentiality and ethical rules in favor of the efficiencies of a "one-stop shopping" option.[25]

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[19] *Id.*
[20] *Id.* at 380-81.
[21] *Id.* at 381.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 382.
[25] *Id.*

The MacCrate Report concluded that the "free marketplace" is not the solution to all of society's problems.[26] "To the contrary, society has historically needed frequent governmental intervention and protection *against* the free marketplace."[27] The Report noted that the government has imposed a broad range of regulations on matters concerning public health and safety and on various professions.[28] Although a consumer may desire a free marketplace, the Report explained that "[i]t is in the public interest to ensure that the people who hold themselves out as having special skills, whether they be medical, legal, accounting or other skills, in fact possess those skills and that they comport themselves in a manner commensurate with the high degree of trust the public tends to repose in its professionals."[29]

In the legal profession, the Report explained, the judicial branch of government has been responsible for: 1) screening those who seek admission to the profession, 2) supervising continuing legal education, 3) exercising continuing disciplinary authority over those who engage in the practice of law, and 4) terminating the licenses of lawyers who fail to comply with minimum professional standards.[30] Furthermore, "states continue to enforce unauthorized practice of law restrictions to be sure that nonlawyers do not injure the public by purporting to provide clients with legal services."[31] The Report concluded on this point, noting that, prohibiting "nonlawyers from having any significant influence in the manner in which lawyers deliver legal services to clients (including through passive investment in entities providing legal services to the public) is a crucial attribute of the independent bar, which has traditionally played an important role in our culture."[32]

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[26] *Id.*
[27] *Id.* at 382-83.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 383.
[31] *Id.*
[32] *Id.* at 384.

Moreover, even if there were public demand to combine legal and nonlegal services—and the Report pointed out that the evidence of such demand was equivocal at best—such demand could be and is satisfied by strategic alliances, other contractual relationships with nonlegal professional service providers and lawyers owning and operating nonlegal businesses.[33] These arrangements are different from the proposals of those advocating for nonlawyer ownership, maintained the MacCrate Report, in that the lawyers and nonlawyers in such relationships do not refer to each other as a "partner."[34] The Report underscored the importance of a lawyer's duties of loyalty, confidentiality and independent professional judgment to a client and indicated that vesting any measure of control over the exercise of these duties in the hands of nonlawyers may put those critical values at risk, especially without any effective oversight.[35]

The MacCrate Report listed a series of specific dangers that it anticipated if nonlawyers were permitted to be significantly involved in the management of a law firm.[36] For example, nonlawyer owners "might well view the practice of law less in professional terms than in terms of being but one of several profit centers" and would be less likely to encourage pro bono or public interest work.[37] "In sum," the Report noted, "placing any measure of control over the practice of law in the hands of nonlawyers would form a constant backdrop for the lawyers attempting to practice in the organization, as the financial objectives of nonlawyer management perpetually compete with considerations of professional ethics and the formulation of independent judgments in the best interests of legal clients and the legal system."[38]

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[33] *Id.*
[34] *Id.* at 385.
[35] *Id.*
[36] *Id.* at 386.
[37] *Id.*
[38] *Id.* at 386-87.

In situations where a nonlawyer may have an ownership interest in a law firm, the MacCrate Report pointed to the difficulty of ensuring that lawyers maintain control over their practices because "[i]ndicia of nonlawyer influence will often be elusive."[39] The Report noted that it would be extremely difficult to define "the point at which a nonlawyer's role within an organization rises to the level of inappropriate interference with practice governance."[40] Given that alternative means exist to accomplish the goals sought to be achieved through transfers of control of law firms to nonlawyers, the MacCrate Report declined to take on the risks associated with such a proposal and ultimately rejected the notion that the rules against nonlawyer participation in the practice of law should be relaxed.[41] Although the Report recognized that "we [are] mindful . . . that denying nonlawyers the ability to have a financial interest or otherwise participate in law firm governance deprives lawyers of significant opportunities for financial gain," the MacCrate Committee "believe[d] that it is in the public interest that lawyers forego this opportunity."[42]

B. *NYSBA's House of Delegates Votes Against Nonlawyer Ownership*

At its annual meeting held in June of 2000, the MacCrate Report came before NYSBA's House of Delegates and was resoundingly approved by a voice vote after spirited debate.[43] The resolution adopted by the House of Delegates provides, in pertinent part, that:

> (1) Lawyers and law firms should be permitted to provide nonlegal services to clients or other persons, directly or through affiliated entities, provided that no nonlawyer or nonlegal entity involved in the provision of such

[39] *Id.* at 387.
[40] *Id.*
[41] *Id.* at 387-88.
[42] *Id.* at 388. The MacCrate Report also recommended that New York adopt a rule addressing ancillary nonlegal services offered by lawyers and strategic allies.
[43] *See, e.g.*, John Caher, *Multidisciplinary Practice Rules Adopted by State*, N.Y.L.J., July 25, 2001**,** at 1.

services owns or controls the practice of law by a lawyer or law firm or otherwise is permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.

(2) Lawyers and law firms should be permitted to enter into interprofessional contractual arrangements with nonlegal professionals and nonlegal professional service firms for the purpose of offering legal and other professional services to the public, on a systematic and continuing basis, provided no nonlawyer or nonlegal entity has any ownership or investment interest in, or managerial or supervisory right, power or position in connection with, the practice of law by any lawyer or law firm.

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(5) Nonlawyer investment in entities practicing law should continue to be prohibited.

(6) No change should be made to the law that now prohibits lawyers and law firms directly or indirectly from transferring ownership or control to nonlawyers over entities practicing law, since any demand that exists for greater integration of legal services with those of other professions may be satisfied by permitting lawyers to enter into strategic alliances and other contractual relationships with nonlegal professional service providers, as well as by permitting lawyers to own and operate nonlegal businesses.

NYSBA then directed the bench and bar to consider adding the MacCrate Report's proposed amendments to the Code of Professional Responsibility. In August 2000, proposed amendments to the Code were distributed statewide for comment. The proposals were then

debated at the November 2000 NYSBA House of Delegates meeting and, after some modifications to reflect public comments, were approved and forwarded to the courts for consideration.[44]

C. *The ABA Rejects a Proposal to Allow "Lawyer Controlled" Multidisciplinary Practice.*

In 2000, the ABA Commission on Multidisciplinary Practice issued a more modest proposal for nonlawyer ownership which recommended that only "lawyer controlled" multidisciplinary practices be permitted.[45] At the ABA Summer Meeting in 2000, by a vote of 314 to 106, the ABA House of Delegates rejected this proposal in favor of the approach taken in the MacCrate Report.[46] The resolution of the ABA House of Delegates was similar to the resolution passed by NYSBA's House of Delegates in June 2000 and provided:

> that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions and committees undertake a review of the Model Rules of Professional Conduct ("MRPC") and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with non-legal professional service providers consistent with the statement of principles in this Recommendation. [47]

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[44] *See* John Caher, *MDP Remains a Hot Topic of Debate*, N.Y.L.J., Nov. 7, 2000, at 1; *see also* Wechsler, 2000-2001 *Survey of New York Law: Prof'l Responsibility*, 52 SYR. L. REV. 563, 574-5 (2002) (discussing events leading up to adoption of new Disciplinary Rules).
[45] Steven C. Krane, *The Heat Subsides: The Future of MDPs in New York*, The New York Prof'l Responsibility Report, Sept. 2000.
[46] *Id*.
[47] *Id*.

To the best of the Task Force's knowledge, the ABA did not undertake further actions concerning multidisciplinary practice or nonlawyer ownership from 2000 up to the time when the Ethics 20/20 Commission conducted its work, although the developments in the United Kingdom, Australia and other jurisdictions may have been discussed at ABA meetings or conferences during that period.

D. *The Appellate Divisions of the New York State Supreme Court Adopt Rules Addressing a Lawyer's Provision of Nonlegal Services and Contractual Relations Between Lawyers and Nonlegal Professionals*

On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001, specifically DR 1-106 of the Code of Professional Responsibility, entitled "Responsibilities Regarding Non-legal Services." DR 1-106 addressed "the responsibilities of lawyers or law firms providing nonlegal services to clients or other persons, including lawyers or law firms that own or control an entity providing nonlegal services to clients of the lawyer or law firm, or themselves operate a business providing nonlegal services that are distinct from the legal services they provide."[48] For purposes of DR 1-106, "non-legal services" included "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer."[49] The MacCrate Committee, in proposing DR 1-106, noted that a broad array of nonlegal businesses were being conducted by law firms or by entities owned by law firms, such as lobbying, economic or scientific expertise, appraisal services, accounting, financial planning, real estate and insurance brokerage, title insurance and private investigations.[50]

DR 1-106 created a strong presumption that the Code applies to lawyers who perform law-related services and to lawyers who own or control an entity providing nonlegal services.

[48] NYSBA Comm. on Prof'l Ethics, Op. 752 (2002).
[49] DR 1-106(C).
[50] MacCrate Report at 98-103.

DR 1-106 (A)(1) provided that "[a] lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services."[51] In addition, if a lawyer or law firm provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or lawyer's firm, the lawyer or law firm must adhere to the Code "with respect to the nonlegal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship."[52] Furthermore, "[a] lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person" was subject to the Code with respect to the nonlegal services "if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship."[53]

DR 1-106(B) contained an important caveat for lawyers who coordinate with nonlawyers to provide nonlegal services. That provision cautioned that "a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty [of confidentiality] with respect to the confidences and secrets of a client receiving legal services."[54]

[51] DR 1-106(A)(1).
[52] DR 1-106(A)(2).
[53] DR 1-106(A)(3).
[54] DR 1-106(A)(4).

The second rule adopted by the Appellate Divisions concerning multidisciplinary practice, also effective November 1, 2001, was DR 1-107, entitled "Contractual Relationships Between Lawyers and Nonlegal Professionals." DR 1-107(A) noted that "a lawyer or law firm may enter into and maintain a contractual relationship with a non-legal professional or non-legal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm, as well as other non-legal professional services" provided certain conditions are met.[55]

While generally permitted, contractual relationships between lawyers and nonlegal professionals were closely regulated by the courts. Lawyers or law firms entering into and maintaining such contractual relationships had to ensure that the profession of the nonlegal professional or nonlegal professional service firm was included in a list established by the Appellate Divisions.[56] Those professions seeking to be included on the list had to meet certain criteria outlined in DR 1-107(B)(1). The profession had to be composed of individuals who: 1) possessed a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university or work experience, 2) were licensed to practice their profession by an agency of the State of New York or the United States Government, and 3) were "required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession."[57] To date, members of only five nonlegal professions have been deemed eligible to form contractual business relationships with lawyers: 1) architecture,

[55] DR 1-107(A).
[56] DR 1-107(A)(1).
[57] DR 1-107(B)(1)(c).

2) certified public accountancy, 3) professional engineering, 4) land surveying, and 5) certified social work.[58]

Significantly, DR 1-107(A)(2) prohibited a lawyer who enters into a contractual relationship with one of the approved groups from permitting the nonlegal professional or nonlegal professional service firm "to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm."[59] In addition, a lawyer entering into a contractual relationship with a nonlegal professional under DR 1-107(A) was, nonetheless, still subject to the traditional prohibitions against sharing legal fees with a nonlawyer or receiving or giving any monetary or other tangible benefit for forwarding or receiving a referral.[60]

E. *The COSAC Report and the Appellate Divisions' Enactment of the New York Rules of Professional Conduct, effective April 1, 2009*

In 2007, NYSBA's Committee on Standards of Attorney Conduct ("COSAC") issued an extensive report and proposed that New York replace the Code of Professional Responsibility with a set of ethical rules following the format of the ABA Model Rules of Professional Conduct but as revised for application in New York.[61] NYSBA's House of Delegates approved the COSAC Report proposing the Model Rules, with modifications, at a meeting held on November 3, 2007.

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[58] 22 N.Y.C.R.R. 1205.5 (" Nonlegal professions eligible to form cooperative business arrangements with lawyers").
[59] DR 1-107(A)(2).
[60] *Id*; *see also* DR 2-103(D), DR 3-102(A). A complete set of the disciplinary rules may be found at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf. The New York Rules of Professional Conduct, including rules 1.5, 5.4 and 8.5, may be found at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended070112.pdf.
[61] NYSBA Comm. on Standards of Attorney Conduct "PROPOSED NEW YORK RULES OF PROF"L CONDUCT," p.p. ii-vii (2008) ("COSAC Report").

On February 1, 2008, NYSBA forwarded COSAC's proposed set of rules and comments to the Presiding Justices of the Appellate Divisions. On December 16, 2008, the Appellate Divisions announced that, effective April 1, 2009, New York attorneys would be governed by the New York Rules of Professional Conduct ("New York Rules"). While the courts adopted the proposed numbering system, based on the ABA Model Rules, the New York Rules maintain most of the substance of the former Code.

The Appellate Divisions did not add any provisions to the New York Rules allowing nonlawyer ownership of law firms and maintained the contents of DR 1-106 and DR 1-107 and carried them forward in Rule 5.7 ("Responsibilities Regarding Nonlegal Services") and Rule 5.8 ("Contractual Relationship Between Lawyers and Nonlegal Professionals"), respectively.[62]

F. ***New York State Bar Opinions 889 and 911***

How to reconcile New York's Rules of Professional Conduct prohibiting nonlawyer ownership with the rules of other jurisdictions permitting such ownership has recently been considered by NYSBA's Committee on Professional Ethics in two different contexts. It should be noted that the Committee's opinions interpreted the current Rules, but did not address the question of what policies best accommodate firms active in jurisdictions with conflicting rules or whether New York's Rules ought to be modified to adapt to developments around the world.

In Opinion 889, dated November 15, 2011, the Committee was asked by an attorney admitted and practicing in a firm in the District of Columbia whether he could share fees with a nonlawyer who would assist the firm in a class action brought in New York. The lawyer was also admitted in New York.

[62] The contents of DR 1-107(D), which provided that "a lawyer or law firm could allocate costs and expenses with a non-legal professional or non-legal professional service firm pursuant to a contractual relationship permitted by DR 1-107 (A), provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred by each," were not included in Rule 5.8. Nonetheless, such permission is implied in the Rules. *See* Rule 5.8, Comment 2.

Noting the conflicting rules in the District and in New York, the Committee examined the provisions of Rule 8.5, the choice of law provision. The Committee explained that "[f]orming a District of Columbia partnership with a non-lawyer in the District of Columbia does not become subject to New York Rule 5.4 (prohibiting fee sharing or a partnership with a nonlawyer) just because the partnership may undertake some New York litigation work." The Committee opined that the provision of New York Rule 8.5 applying the Rules of the jurisdiction having the "predominant effect" led to the conclusion that the Rules of the District were applicable. It reasoned: "Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation."

Several months after issuing this opinion, the Committee answered a request from a lawyer who wished to become associated with a UK firm that had nonlawyers in supervisory and ownership positions, as permitted in that country. The New York lawyers, as part of the firm, intended to establish a New York office to represent New York clients, but they would not share confidences with the UK nonlawyer owners.

The Committee, in Opinion 911, dated March 14, 2012, concluded that, under these facts, the New York Rule applied and the arrangement was prohibited. It contrasted Opinion 889, and explained that "Rule 5.4 would govern the propriety of the arrangement with the UK entity. Even if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York."

III. The ABA's Ethics 20/20 Commission Proposals and the NLO Task Force's Mission

The ABA established the Ethics 20/20 Commission in 2009 to conduct a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. The Ethics 20/20 Commission's November 2009 Preliminary Issues Outline identified several issues for consideration and study.[63] Among other things, the outline identified issues concerning alternative business structures, such as law practices with nonlawyer managers/owners, multidisciplinary practices, or incorporated or publicly traded law firms in other countries that raise ethical and regulatory questions for U.S. lawyers and law firms.[64] The Commission then conducted a three-year study of the preliminary issues that it had identified, examining how globalization and technology are transforming the practice of law and how the regulation of lawyers should be updated in light of those developments. The Commission emphasized that its "work in this area has been guided by three principles: protecting the public; preserving core professional values; and maintaining a strong, independent, and self-regulated profession."[65]

In June 2011, the Ethics 20/20 Commission publicly rejected certain forms of nonlawyer ownership that certain other jurisdictions currently permit, including multidisciplinary practices, publicly traded law firms, and passive, outside nonlawyer investment or ownership in law firms.[66] After further consideration and study, on December 2, 2011, the Commission released for comment a Discussion Draft describing a limited form of court-regulated, nonlawyer

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[63] ABA Comm'n on Ethics 20/20 Preliminary Issues Outline (Nov. 19, 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

[64] *Id*. at 6.

[65] ABA Comm'n on Ethics 20/20, *For Comment: Discussion Paper on Alternative Law Practice Structures*, at 1 (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf ("Ethics 20/20 Discussion Draft on NLO").

[66] *See* Press Release, ABA Comm'n on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Firms (April 16, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

ownership of law firms (the "ABA NLO Proposal").[67] The ABA NLO Proposal would have allowed nonlawyers, who are employed by a law firm and assist the firm's lawyers in the provision of legal services, to hold a minority financial interest in the firm and share in its profits.[68] The draft resembled the approach permitted by the District of Columbia in its Rule 5.4 ("Professional Independence of a Lawyer")[69] for more than twenty years, but included additional requirements that lawyers in a firm retain controlling voting rights and financial interests in the firm.[70] Specifically, the ABA NLO Proposal recommended consideration of amendments to the Model Rules to allow nonlawyer ownership of firms under the following restrictions:

- such law firms would be restricted to providing legal services;
- nonlawyer owners would have to be active in the firm, providing services that support the delivery of legal services by the lawyers (i.e., the firm could not be a multidisciplinary practice);
- nonlawyer ownership and voting interests would be restricted by a 25% cap intended to ensure that lawyers retain control of the firm;
- nonlawyer owners would be required to agree in writing to conduct themselves in a manner consistent with the Rules of Professional Conduct for lawyers; and
- lawyer owners would be responsible for both ensuring that the nonlawyer owners in their firm were of good character and supervising the

[67] Ethics 20/20 Discussion Draft on NLO.
[68] *Id*. at 2.
[69] D.C. Bar, D.C. Rules of Prof'l Conduct, Rule 5.4.
[70] Ethics 20/20 Discussion Draft on NLO at 2.

nonlawyers in regard to compliance with the Rules of Professional Conduct.[71]

On April 16, 2012, however, the Ethics 20/20 Commission announced that it had "decided not to propose changes to ABA policy prohibiting nonlawyer ownership of law firms."[72] The Commission indicated that it had considered the pros and cons of the proposal in the Ethics 20/20 Discussion Draft on NLO, "including thoughtful comments that the changes recommended in the Discussion Draft were both too modest and too expansive."[73] The Co-Chairs of the Commission stated that "[b]ased on the Commission's extensive outreach, research, consultation, and the response of the profession, there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms."[74] In sum, the Commission "concluded that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model."[75]

The Ethics 20/20 Commission noted that it would, however, "continue to consider how to provide practical guidance about choice of law problems that are arising because some jurisdictions, including the District of Columbia and a growing number of foreign jurisdictions, permit nonlawyer ownership of law firms."[76] The Commission explained that it believes that these issues "need pragmatic attention" and cited its previously released draft proposals addressing them.[77] The Commission announced that it would decide at its October 2012 meeting

[71] *Id*.
[72] *See supra* note 66, at 1.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.

whether to submit formal proposals on these subjects to the ABA House of Delegates for consideration in February 2013 and that it welcomed comments on its draft proposals.[78]

These choice of law proposals, also released on December 2, 2011, were contained in a document entitled "Initial Draft Proposal for Comment Choice of Law-Alternative Law Practice Structures."[79] The draft contained proposals (the "ABA Conflicts of Law Proposal") to address "problems that arise as a result of jurisdictional inconsistencies, both domestically and abroad, concerning nonlawyer ownership interests in law firms."[80] The Ethics 20/20 Commission stated that it had learned that lawyers licensed in the United States "want more guidance as to their ethical obligations when they are asked to work with or within firms that have nonlawyer owners or partners."[81] The ABA Conflicts of Law Proposal was much narrower than the ABA NLO Proposal and recommended amendments to Model Rule 1.5 ("Fees") and Model Rule 5.4 ("Professional Independence of a Lawyer") "to address inconsistencies among jurisdictions, both domestically and abroad, with regard to the sharing of fees with nonlawyers."[82]

The ABA Conflicts of Law Proposal would have amended Model Rule 1.5, and Comment 8 thereto, to address the problem that arises when one firm that is governed by a version of Model Rule 5.4 that does not permit nonlawyer partners or owners enters into a fee-sharing agreement[83] with another firm that is permitted to have nonlawyer partners or owners

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[78] *Id*.
[79] ABA Comm'n on Ethics 20/20: Initial Draft Proposal for Comment Choice of Law - Alt. Law Practice Structures (Dec. 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf ("Ethics 20/20 Initial Draft Proposal on Choice of Law Issues").
[80] *Id*. at 1.
[81] *Id*.
[82] Summary of Actions by the ABA Comm'n on Ethics 20/20, at 5 (Dec. 28, 2011), *available at* http://www.legalethicsforum.com/files/20111228-summary-of-ethics-20-20-commission-actions-december-2011-final.pdf.
[83] Fee splitting agreements between lawyers not in the same firm are governed by ABA Model Rule 1.5(e) and New York Rule 1.5(g).

under its applicable professional conduct rules.[84] The proposed amendments to ABA Model Rule 1.5, contained in a proposed resolution accompanying the ABA Conflicts of Law Proposal, would have allowed a lawyer to divide a legal fee with another firm that has nonlawyer partners and owners in a jurisdiction that allows such ownership.[85] The proposed amendment to ABA Model Rule 1.5(e) read as follows, with insertions underlined:

> (e) A division of a fee between lawyers who are not in the same firm or between law firms may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or law firm or each lawyer or firm assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer or law firm will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.[86]

A proposed amendment to Comment 8 to ABA Model Rule 1.5 would have clarifed the intended scope of the above proposal. It stated as follows:

> [8] Paragraph (e) permits the division of a fee with a law firm in which a nonlawyer is a partner or has an ownership interest. But see Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rule of Professional Conduct). The Rule does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.[87]

[84] Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 1-2.
[85] *Id.*
[86] *Id*.
[87] *Id*. at 3.

The proposed amendments to ABA Model Rule 5.4, also contained in a proposed resolution that accompanied the ABA Conflicts of Law Proposal, attempted to resolve a somewhat similar problem that arises when a lawyer practicing in the office of a law firm where nonlawyer fee sharing is impermissible attempts to share fees with nonlawyers in the same firm who are located in another office where such fee sharing is permissible.[88] The Ethics 20/20 Commission concluded that a lawyer should be permitted to share fees with nonlawyers under these circumstances, "but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer."[89] This approach was contrary to NYSBA Opinion 911 discussed above, although it was endorsed by the Philadelphia Bar Association in an ethics opinion issued in September 2010.[90]

The proposed amendment to ABA Model Rule 5.4 added a new subsection (a)(5), which read as follows:

> (5) a lawyer may share legal fees with a nonlawyer in the lawyer's firm in a manner that is not otherwise permissible under this Rule, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer. See Rule 8.5(b).[91]

[88] *Id*. at 2.
[89] *Id*.
[90] The Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2010-7 (Sept. 2010); *see supra* Section II.F.
[91] Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 4-5.

The proposed amendment was accompanied by the addition of a new Comment 3 to ABA Model Rule 5.4, which would have clarified the intended scope of the above proposal. It stated as follows:

> [3] Paragraph (a)(5) recognizes that the Rule regarding fee sharing with nonlawyers varies among jurisdictions, both within and outside the United States. As a result, a lawyer may be asked to share fees with nonlawyers in the same firm when that form of fee sharing is not permitted under the rules of the jurisdiction that apply to that lawyer, but permitted under the rules of the jurisdiction that apply to the permissibility of fee sharing with the nonlawyer. Under these circumstances, Rule 8.5(b)(2) (Choice of Law) states that the Rule to be applied is the Rule of the jurisdiction where "the lawyer's conduct occurred" or had its "predominant effect," even if the lawyer is not admitted in that jurisdiction. Under this test, if a nonlawyer works exclusively with lawyers and serves clients in an office located in a jurisdiction that permits nonlawyer partnership or ownership interests, Rule 8.5(b)(2) ordinarily permits the firm's lawyers, including those lawyers located in jurisdictions that do not permit such partnerships or ownership interests, to share fees with the nonlawyer because the predominant effect of the fee sharing will be in the jurisdiction that allows it. To determine whether a lawyer can divide fees with a different firm in which a nonlawyer is a partner or has an ownership interest, see Rule 1.5, Comment [8].[92]

[92] *Id*. at 5-6.

After the Task Force issued the initial draft of its Task Force Report on September 14, 2012, the Ethics 20/20 Commission issued two revised drafts for comment on September 18, 2012.[93] The first draft addressed choice of rule agreements for conflicts of interest, and is not the subject of this Task Force Report. The second draft (the "Inter Firm Fee Sharing Proposal"), pertinent to the work of the Task Force, concerns choice of law issues associated with the division of fees between lawyers in different firms where one lawyer practices in a firm in a jurisdiction that prohibits nonlawyer ownership of law firms, and the other practices at a firm that has nonlawyer owners in a jurisdiction that permits it.[94] The Ethics 20/20 Commission observed that "it is important to note that nothing in the draft would alter the existing prohibition on nonlawyer ownership or fee sharing with nonlawyers set forth in Rule 5.4 of the ABA Model Rules of Professional Conduct."[95]

The Ethics 20/20 Commission considered and rejected a proposal to permit fee sharing among members of a single firm that has offices in both jurisdictions that allow nonlawyer ownership and those that do not (intra firm fee sharing).[96] The Commission noted that such a rule would allow for the possibility that a nonlawyer in a jurisdiction that allows nonlawyer ownership of firms could influence lawyers' decisions in those jurisdictions that do not allow nonlawyer ownership.[97]

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[93] ABA Comm'n on Ethics 20/20, *For Comment: New Drafts Regarding Choice of Rule Agreements for Conflicts of Interest and Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms* (Sept. 18, 2012) *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_co_chair_cover_memo_comment_drafts_on_fee_division_model_rule_1_7_final_posting.authcheckdam.pdf. ('Fee Division Memorandum").

[94] *See* ABA Comm'n on Ethics 20/20: Draft for Comment, Fee Division Between Lawyers in Different Firms (Sept. 18, 2012) *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_fee_division_and_choice_of_law_comment_draft_final_posting.authcheckdam.pdf..

[95] Fee Division Memorandum, at 1. Rule 5.4 of the New York Rules of Professional Conduct contains similar prohibitions to those contained in Rule 5.4 of the ABA Model Rules of Professional Conduct.

[96] *Id. See* ABA Formal Op. 91-360 (1991) (considering issues arising from fee sharing among members of a single firm that has offices in both the District of Columbia, which allows nonlawyer ownership, and in a jurisdiction that does not).

[97] Fee Division Memorandum, at 2.

As to issues arising when there is a division of fees between lawyers in separate firms located in two jurisdictions, the Ethics 20/20 Commission decided to propose "modest changes…to clarify that lawyers in jurisdictions that prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with lawyers in different firms in which such ownership or fee sharing occurs and is permitted by the Rules applicable to those firms."[98] The Commission noted that this "practical problem…is arising with greater frequency as lawyers from firms in jurisdictions prohibiting nonlawyer ownership and fee sharing work on client matters with lawyers in firms in other jurisdictions – e.g., the District of Columbia, England, Australia and Canada – that permit various nonlawyer ownership options."[99]

The Ethics 20/20 Commission concluded that lawyers in jurisdictions that prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers should be permitted to divide fees with lawyers in different firms in jurisdictions in which such ownership or fee sharing is permitted "because the concerns underlying the prohibition in Rule 5.4 are not implicated."[100] The Commission observed that "Model Rule 5.4 is designed to insulate lawyers from the influence of nonlawyers," but there is no reason to believe that the nonlawyers in one firm are in a position to influence the lawyers who practice "in a different jurisdiction and in an entirely different firm."[101] Therefore, the Ethics 20/20 Commission proposed the addition of a new Comment to Rule 1.5 to permit, subject to certain limitations, a lawyer to divide a fee with a lawyer in a different law firm, even if that other firm is permitted to have nonlawyer partners or owners. The proposed Comment ("Comment [9]") read as follows:

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[98] *See supra* note 94, at 2.
[99] *Id.*.
[100] *Id.* at 3.
[101] *Id.*

> A lawyer who is governed by the Rules of Professional Conduct in this jurisdiction is prohibited from allowing a nonlawyer to direct or regulate the lawyer's independent professional judgment. See Rule 5.4 (Professional Independence of a Lawyer). Subject to this prohibition, a lawyer in this jurisdiction may divide a fee with a lawyer from another firm in a jurisdiction that permits a firm to share legal fees with nonlawyers or to have nonlawyer owners, unless the lawyer who is governed by the Rules of Professional Conduct in this jurisdiction knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship. See Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).[102]

On October 29, 2012, the Ethics 20/20 Commission withdrew its Inter Firm Fee Sharing Proposal, choosing not to present the proposed rule change to the ABA House of Delegates, but rather referring the "narrow and technical issue" to the Standing Committee on Ethics and Professional Responsibility.[103] The Ethics 20/20 Commission noted that it discussed the issue at its October 25 and 26 meetings, and concluded that "subject to the prohibition of Rule 5.4 (Professional Independence of a Lawyer), the authority to divide fees between lawyers in two independent firms currently exists in Model Rule 1.5."[104] According to Co-Chair Jamie Gorelick, "[i]n deciding which proposals to bring to the House of Delegates, we have considered the importance of the issue to the profession, whether there is confusion as to the application of

[102] *Id.*
[103] *See* Press Release, ABA Commission on Ethics 20/20 Will Refer Fee Division Issues to the Standing Committee on Ethics and Professional Responsibility Rather Than Propose Changes to ABA Model Rule 1.5 (Oct. 29, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121029_fee_division_release_ethics_20_20_commission_co_chair_cover_memo.authcheckdam.pdf.
[104] *Id.*

the rules that we can helpfully address, and whether a change in the rules is necessary and helpful to address changes in the legal environment."[105] Nonetheless, the Task Force decided that, having already given considerable thought to the issues, it should continue to provide its analysis of and comments on the Inter Firm Fee Sharing Proposal in this Report for the benefit of future debate by NYSBA, and potentially the ABA.

IV. Nonlawyer Ownership in Other Jurisdictions

A. *Australia*

Australia is a Federation comprised of six states and each state has the power through its own constitution to regulate and oversee the legal profession.[106] Australia allows both multidisciplinary practices ("MDPs") and incorporated legal practices ("ILPs").[107] Australia's legal profession is primarily comprised of sole practitioners and small law firms, which constitute approximately 80 percent of the total numbers of lawyers in the country.[108]

The alternative business model reform, which included allowing nonlawyer ownership of law firms, began in Australia in 1994 when New South Wales became the first state in Australia to allow MDP.[109] This groundbreaking legislation permitting MDP, the first such rule in any common law jurisdiction, also required that lawyers retain at least 51% of the net partnership income.[110] Interestingly, there was little interest in establishing MDP when the legislation

[105] *Id*.
[106] Ethics 20/20 Initial Draft Proposal on Choice of Law Issues, at 7.
[107] ABA Comm'n on Ethics 20/20 Working Group on Alt. Bus. Structures, *For Comment: Issues Paper Concerning Alternative Business Structures*, at 8 (Apr. 5, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.
[108] *Id*. at 7 (citing Murray Hawkins, Dir., Nat'l Legal Profession Project, "Australian Models of Regulating the Legal Profession," Presentation to the Fed'n of Law Societies of Can. Semi-Annual Conference, 17-19 (Mar. 2011)).
[109] *See supra* note 107, at 8.
[110] *Id*.

passed, apparently because most lawyers and law firms felt "that law should remain a profession and not be treated as a business."[111]

In Australia, MDP is defined as "a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services."[112] Each legal practitioner who is a partner in such a practice is responsible for the management of the practice's legal services and they must ensure that the rules and regulations governing the practice of law are followed.[113] The Supreme Court of Australia can prohibit a practitioner from being a partner in an MDP if it finds that the practitioner is unfit to occupy such a position.[114]

Eventually, "pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection, and increased interest in innovation" led to proposals in Australia to allow ILPs, including MDPs and publicly traded law firms, and to eliminate the 50% rule.[115] Despite some hesitance based on "concerns within the profession about conflicting duties and increased risks of unethical behavior," regulators and the organized bar in Australia were able to establish this form of an alternative business structure.[116] As of December 2010, there are approximately 2,000 ILPs in Australia, and that number is reportedly growing.[117]

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[111] *Id*. (citing Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response* (2010)).
[112] Legal Profession Act § 153 (2004) (N.S. Wales).
[113] *See supra* note 107, at 10.
[114] *Id*.
[115] *Id*. at 8.
[116] *Id*.
[117] *Id*. (citing Murray Hawkins, Dir., Nat'l Legal Profession Project, "Australian. Models of Regulating the Legal Profession," Presentation to the Fed'n of Law Societies of Can. Semi-Annual Conference, 17–19 (Mar. 2011)).

Each Australian state has the authority to set the primary rules governing ILPs.[118] An ILP may provide legal and any other services except that it may not operate a "managed investment scheme" or any other service that is not allowed by the applicable regulations.[119] Laws relating to attorney-client privilege and other applicable legal professional privileges apply to ILPs and the lawyers who are officers or employees of an ILP.[120] ILPs are listed on the Australian Stock Exchange and may have external investors. They must operate in compliance with the Australian Federal Corporations Act and must register with the Australian Securities & Investment Commission.[121]

An ILP must appoint a Legal Practitioner Director upon incorporation.[122] The Legal Practitioner Director is responsible for the management of the legal services provided by the ILP.[123] It is also responsible for reporting any misconduct by the ILP or any of its employees or directors.[124] Sanctions for misconduct may be taken against the entire ILP, any director or any practitioner within the ILP.[125]

B. *United Kingdom*

The UK allows nonlawyer ownership of law firms and passive outside investment in law firms by nonlawyers. The movement in the UK toward nonlawyer ownership began about ten years ago when a 2001 Report of the Office of Fair Trading, entitled *Competition in Professions*, concluded that certain rules governing the legal profession were unduly restrictive.[126] Several

[118] *See supra* note 107, at 8.
[119] *Id*. at 9 (citing Legal Profession Act 2005, *available at* http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/).
[120] *See supra* note 107, at 9.
[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*. at 10.
[126] *See* John Vickers, Director General of Fair Trading, Report on Competition in Professions (Mar. 2011), *available at* http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf.

groups outside the legal profession raised concerns that the disciplinary system operated by the Law Society of England and Wales was confusing, inconsistent, protective of lawyers, and unresponsive to client needs.[127] As a result, the government solicited a study led by Sir David Clementi to address these issues.[128]

In 2004, Sir David Clementi's group issued a report entitled *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*.[129] Many of the recommendations made in that Report were incorporated into the Legal Services Act of 2007 ("LSA"), including recommendations pertaining to alternative business structures for providing legal services ("ABS").[130] Under the LSA, ABS are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with nonlegal services.[131] The LSA is comprehensive in its scope and provides for regulation of the ABS entity as well as the individual.[132]

The Legal Services Board ("LSB"), established by the LSA, is a national, non-governmental regulator of all groups that regulate the legal profession and it determines which alternative business structures are allowable.[133] The LSB has designated the Solicitors Regulation Authority ("SRA") as an approved regulator for these entities, but there may also be other approved regulators.[134] All entities with a nonlawyer manager and/or owner must be

[127] *Id*. at 50–52 (explaining the current regulatory structure in place and the problems within that structure).
[128] David Clementi, Report of the Review of the Regulatory Framework for Legal Services in England and Wales, 1 (Dec. 2004), *available at* http://www.legal-services-review.org.uk/content/report/index.htm (hereinafter referred to as "Clementi Report").
[129] *See id*.
[130] Legal Services Act 2007, Part 5, Alternative Business Structures, *available at* http://www.sra.org.uk/lsa.
[131] *See* http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page.
[132] *See infra* Appendix A, at A-7.
[133] *See infra* Appendix A, at A-5.
[134] *See* http://www.sra.org.uk/sra/how-we-work.page.

licensed, and all individual participants also must be authorized.[135] Unlike Australia, the LSA requires nonlawyer owners and managers to pass a "fit to own" test.[136]

Chris Kenny, the Chief Executive of the UK Legal Services Board, explained to the Task Force that three different factors forced these changes in the UK: 1) pressure coming from UK competition authorities; 2) complaints from consumers of legal services and the legal profession's inability to deal with them; and 3) a "confidence collapse" caused by the push toward a more consumer-oriented legal culture in the UK.[137] Kenny explained that nonlawyer ownership of law firms makes legal services "more accessible, cheap and cheerful."[138] Kenny believes that the Act will lead to better services and more consumer satisfaction.

There are currently 150 applications before the LSB that are being considered for approval as nonlawyer ownership structures. These business structures include: legal disciplinary partnerships ("LDPs") consisting of IT directors and specialist lawyers, office staff receiving internal ownership rights in the firm, personal injury firms of all sizes making public offerings, private equity firms owning law practices, and family law firms.

LDPs are a form of MDP that permits up to 25% of a law firm's partnership interests to be owned by nonlawyers.[139] An LDP can only provide legal services, but may have managers who are different types of lawyers, such as barristers and solicitors.[140] An LDP can include up to 25% nonlawyer managers, but external owners are not permitted.[141] Nonlawyer managers are subject to a fitness review and approval by the SRA; LDPs must pay the cost of a criminal

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[135] *See supra* note 107, at 13.
[136] *See, e.g.*, SRA Suitability Test 2011 (Version 4, June 21, 2012), *available at* http://www.sra.org.uk/solicitors/handbook/suitabilitytest/content.page (hereinafter referred to as "Suitability Test").
[137] *See infra* Appendix A, at A-5-6.
[138] *See id*. at A-6.
[139] *See* http://www.sra.org.uk/sra/legal-services-act/faqs/01-legal-services-act-basics/What-is-an-LDP.page. Since March 31, 2009, firms in the UK have been able to become licensed as LDPs.
[140] *Id*.; *see* Ethics 20/20 Discussion Draft on NLO, at 8.
[141] *Id*.

background check for each nonlawyer principal.[142] The SRA can withdraw approval of a nonlawyer manager and may also direct an LDP to appoint a lawyer to ensure compliance with the LDP's obligations and duties under applicable law.[143] LDPs are required to maintain professional liability insurance.[144]

At an August 2010 meeting of the Ethics 20/20 Commission, the Chief Executive of the Law Society of England and Wales reported that, as of June 2010, there were 254 registered LDPs.[145] Over 70% of these LDPs had 10 or fewer partners.[146] The nonlawyer partners in these LDPs included teachers, financial planners, and accountants.[147] By October 2011, the SRA had approved registration of 490 LDPs, nearly double the number from April 2010.[148] The average size of all LDPs with nonlawyers was seven partners.[149] The largest LDPs with nonlawyers had more than 300 partners.

C. *District of Columbia*

In 1990, the District of Columbia adopted a unique version of Rule 5.4, which permits a lawyer to form a partnership with a nonlawyer if the main purpose of the partnership is to practice law.[150] The District of Columbia's version of Rule 5.4 – unlike any other version of Rule 5.4 in the U.S. – permits a nonlawyer to hold a financial or managerial interest in such a partnership so long as the nonlawyer "performs professional services which assist the organization in providing legal services to clients" and abides by the Rules of Professional

[142] *See* Suitability Test, *supra* note 136.
[143] *Id*.
[144] *Id*.
[145] Ethics 20/20 Discussion Draft on NLO, at 8.
[146] *Id*.
[147] *Id*. at 9.
[148] *Id*.
[149] *Id*.
[150] D.C. Rule of Prof'l Conduct 5.4(a)(4); 5.4(b).

Conduct.[151] The District of Columbia's Rule 5.4(b) also dictates that "[t]he lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers."[152] All the conditions of Rule 5.4(b) must be set out in a written instrument.[153]

The District of Columbia's version of Rule 5.4 does not allow for passive nonlawyer investment.[154] In addition, the Rule does not contain any cap on the nonlawyer ownership percentage and does not require nonlawyers to pass a fitness test prior to obtaining ownership in a law firm.

Hope Todd, the D.C. Bar's Legal Ethics Coordinator, who spoke at a meeting of the Task Force on April 24, 2012, explained that the Rule allowing nonlawyer ownership has not seen much use in the District of Columbia because a lawyer, if practicing anywhere outside of the District, would most certainly be in violation of another state's laws that prohibit nonlawyer ownership of law firms. According to Todd, most lawyers who are interested in setting up an alternative practice allowed by the District's Rule 5.4(b) abandon their plans once they learn about licensure problems in other states.

V. Speakers and Presentations at Task Force Meetings

Perhaps one of the most informative activities of the Task Force was its solicitation of the input, views, and experiences of a variety of individuals whose professional work has touched on, either directly or indirectly, nonlawyer ownership issues. The Task Force sought information from speakers representing the following viewpoints: the Ethics 20/20 Commission; the

[151] D.C. Rule of Prof'l Conduct 5.4(b).
[152] D.C. Rule of Prof'l Conduct 5.4(b)(3); *see* D.C. Rule of Prof'l Conduct 5.1 ("Responsibilities of a Partner or Supervisory Lawyer").
[153] D.C. Rule of Prof'l Conduct 5.4(b)(4) and Comment 4 thereto, which notes that "[t]he requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm."
[154] D.C. Rule of Prof'l Conduct 5.4, Comment 8.

experience of jurisdictions that currently allow a form of nonlawyer ownership (*i.e.*, Washington, D.C., the UK, and Australia); and leading attorneys and/or professors in the areas of access to justice, law firm practice management, and legal ethics professionalism. The primary means by which the Task Force obtained such information was by inviting speakers to each of the Task Force's meetings.

The Task Force heard from the speakers listed below, whose presentations are summarized in Appendix A to this Task Force Report:

- Jamie Gorelick, Chair, Ethics 20/20 Commission
- Frederic Ury, Ethics 20/20 Commission
- Phil Schaeffer, ABA Standing Committee on Ethics and Professionalism and Liaison to the Ethics 20/20 Commission
- Chris Kenny, Chief Executive, UK Legal Services Board
- Anthony Davis, Hinshaw & Culbertson LLP
- Steve Mark, New South Wales Legal Services Commissioner
- Tahlia Gordon, Research and Project Manager, New South Wales Office of the Legal Services Commissioner
- Carla Freudenburg, Regulation Counsel, District of Columbia Bar
- Hope Todd, Legal Ethics Coordinator, District of Columbia Bar
- Gene Shipp, Bar Counsel, District of Columbia Bar
- Lawrence Bloom, Senior Staff Attorney, District of Columbia Bar
- David Udell, Executive Director, National Center for Access to Justice at Cardozo Law School; Chair, Subcommittee on Access to Justice of the Committee on Professional Responsibility of the Association of the Bar of the City of New York
- Gary Munneke, Pace Law School; Chair, NYSBA Committee on Law Practice Management; Chair, ABA Law Practice Management Section Task Force on the Evolving Business Model for Law Firms
- Paul Saunders, Chair, N.Y.S. Judicial Institute on Professionalism

VI. Task Force Survey Results

To solicit views on nonlawyer ownership from a broad section of New York attorneys, the Task Force circulated surveys to lawyers divided into three populations: Small Firm Practitioners; Large Firm Practitioners; and Corporate Counsel. Surveys were distributed to NYSBA members through NYSBA's email directory. Across all three populations, the majority

of the over 1,200 survey participants opposed the ABA NLO Proposal.[155] This section summarizes the results of the Task Force's survey.

A. *Demographics*

Both the small and large firm surveys posed the same questions to capture the demographics of survey respondents and to ensure that the respondents fit the criteria for either small or large firm practitioners. The survey asked the following demographic questions:

(1) Are you in private practice?

(2) Number of attorneys in your office/organization?

(3) Please indicate your position.

(4) Number of years admitted to the bar.

(5) Age.

Which New York State area do you practice in (primarily)?

The corporate counsel survey posed a slightly different set of demographic questions, as follows:

(1) Do you consider yourself to be in a Corporate Counsel position?

(2) Please indicate your title.

(3) As corporate counsel, do you use outside counsel?

(4) Number of attorneys in your office/organization?

(5) Number of years admitted to the bar.

(6) Age.

(7) Which New York State area do you practice in (primarily)?

[155] The surveys did not pose questions concerning the ABA's Choice of Law Proposal. At the time of the survey's development and distribution, the ABA's Ethics 20/20 Commission had not yet withdrawn its discussion paper on nonlawyer ownership.

Small Firm Survey Demographics. The Task Force received 821 completed surveys in response to the small firm survey. Reflecting the expected population, 86.9% of respondents worked in firms comprised of less than 10 attorneys. 69.2% of respondents reported working at the partner or of-counsel level, with another 22% of respondents reporting "other" as their title, the majority of whom described themselves as sole owner. 85.5% of respondents had been admitted to the bar at least 10 years, with almost 70% of the respondents having been admitted at least 20 years. Almost 80% of respondents reported being over the age of 45, with over half of respondents over the age of 55 (54%). Respondents as a whole were spread fairly evenly across different regions of the State of New York, with 35.5.% practicing in the New York City boroughs, 28.4% in the New York City suburbs (Nassau, Orange, Rockland, Suffolk, and Westchester counties), and 35.2% in upstate counties (north of Orange and Westchester). Less than 1% of respondents reported practicing out of state or out of country.

Large Firm Survey Demographics. The Task Force received 298 completed surveys in response to the large firm survey. As would be expected, 87.8% of respondents reported working at a firm with at least 20 attorneys, and 48.4% reported working in offices with 100 or more attorneys. 72.5% of respondents indicated that they were in the position of partner, managing partner, or of counsel, while 14.8% indicated they were associates or senior associates, and 12.7% indicated "other" positions, including staff attorney, senior counsel, and retired. 83.2% of respondents had been admitted to the bar for at least 10 years, with 72.4% of respondents having been admitted for at least 20 years. 77% of respondents were over the age of 45, with over half of respondents being over the age of 55 (55.6%). Geographically, the majority of respondents reported primarily practicing law in the New York City boroughs (58.5%), followed by 27.6% of respondents practicing upstate (north of Orange and Westchester

counties), 11.2% in New York City suburbs (Nassau, Orange, Rockland, Suffolk and Westchester counties), and 2.7% practicing out of state or out of country.

Corporate Counsel Survey. The Task Force received 92 completed surveys in response to the corporate counsel survey. In line with expectations, 85.9% of respondents identified themselves as corporate counsel, whose titles included "General Counsel," "Associate General Counsel," "Senior Counsel," and "Associate Counsel." 87.8 % of respondents indicated that they used outside counsel. The reported size of the legal departments varied widely and stretched from one end of the spectrum (one attorney) to the other (over 100 attorneys). 27.5% of respondents said their organization had just one attorney, while 21.3% said there were at least 100 attorneys in the organization. These were the largest two categories, with the numbers of respondents ranging from 3.8% in 50-99 attorney law departments to 18.8% in 2-5 attorney law departments. 80% of respondents reported being admitted to the bar for over 10 years, with 60% of respondents reporting admission for at least 20 years. In comparison to the small and large firm surveys, the largest age range of corporate counsel respondents was between the ages of 36 and 65 (80.2%), followed by 67.9% who were over the age of 45. Geographically, the survey showed a much larger percentage of respondents practicing either out of state or out of country (40.8%) than the small and large firm surveys. The next largest geographic area represented was the New York City boroughs with 28.4% of the respondents, followed by upstate (north of Orange and Westchester counties) with 17.3%, and New York City suburbs (Nassau, Orange, Rockland, Suffolk and Westchester counties) comprising 13.6% of respondents.

B. *Questions Presented*

For both small and large firms, the survey asked the following six questions designed to elicit respondents' substantive views on nonlawyer ownership:

(1) Please indicate your position with respect to the ABA proposal for non-lawyer ownership of firms.

(2) Please explain why.

(3) If the ABA proposal were adopted, would you consider giving non-lawyers an ownership interest in your law firm under the terms proposed?

(4) If so, how would it benefit your firm?

(5) If no, please explain why.

(6) Please include any additional comments you may have about this issue.

The corporate counsel survey posed a slightly different set of substantive questions, again designed to elicit respondents' views on nonlawyer ownership of firms.

(1) Please indicate your position with respect to the ABA proposal for non-lawyer ownership of firms.

(2) Please explain why.

(3) If the ABA proposal were adopted, would you consider it beneficial for your outside counsel to grant non-lawyers an ownership interest in your law firm under the terms proposed?

(4) Please explain why.

(5) If yes, how would this benefit your organization?

(6) If no, please explain what detriments you perceive to your organization.

(7) Please include any additional comments you may have about this issue.

C. *Survey Results*

Of the 1,211 total survey responses received across small firm, large firm, and corporate counsel respondents, 78.4% of all respondents opposed the ABA NLO Proposal. The largest percentage of opponents was seen in the small firm survey, where 81.7% of respondents opposed

nonlawyer ownership. While still representing a majority, corporate counsel respondents were less strongly opposed to nonlawyer ownership, with 67.9% in opposition. Large firm respondents fell in the middle with 75.2% in opposition. Only 4.8% of all respondents reported that they were "not sure" whether they supported the ABA NLO Proposal. A larger percentage of respondents in the corporate counsel survey reported they were "not sure" of their position (11.1%) than did respondents in the small and large firm survey (5.0% and 2.7%, respectively).

In response to the survey about why the respondent was or was not opposed to the ABA NLO Proposal, comments revealed similar trends across all three populations. Comments in opposition to the ABA NLO Proposal generally referred to concerns regarding lawyer independence, client confidentiality, inability to enforce ethical duties of nonlawyers, improper focus on profit over client needs, inability of nonlawyers to fully comprehend the ethics rules, and tarnishing the image of the profession.

Some of the most illustrative comments in the small firm survey from respondents who opposed the proposal were the following:

- "I believe it would lessen the freedom of the attorney to make professional decisions on behalf of the client since investment considerations might prevail over what is best for the client."
- "A disbarred lawyer could easily get right back into the game by being a non-lawyer owner of a subsidiary firm."
- "The non-lawyer expert can be well compensated for his expertise on an employee or consultant basis."
- "Lawyers go through rigorous and expensive schooling and testing to have the privilege of calling themselves lawyers"

- "This will be the end of pro bono work."
- "Many businesses today operate on a cost-benefit analysis, where they weigh the cost of disciplinary/criminal consequences against the benefits of rule-breaking. However in law, that is an unacceptable philosophy. Our professional standards are clear: the consequences of an ethical transgression are not a cost of doing business. Ethical transgressions are themselves inherently unacceptable."

Comments from large firm survey respondents included similarly illustrative remarks in opposition to nonlawyer ownership, such as the following:

- "I feel this will be detrimental to firms providing pro bono legal services as nonlawyers will possibly not understand that ethical obligation."
- "[It] would demean lawyers in the eyes of the public, who would regard it as further evidence that lawyers are in it solely for the money."
- "If a non-lawyer fails to comply with rules of ethics, they do not have a license that can be revoked/suspended, etc. This equates to a lack of accountability."
- "This proposal does not allow for the fundraising that those who seek nonlawyer equity investments have requested, and actually provides for a system more dangerous to the public in which the nonlawyer equity investors actively interfere with the lawyers' performance of their duties."
- "[P]lacing profitability ahead of a client's interest."

Many of the corporate counsel comments raised the same concerns voiced by small and large firm survey respondents in opposition, and included the following:

- "Independent judgment is one of the most critical facet[s] of being a counsel. This could be seriously impacted if we have non-lawyers owning law firms."

- "There are other ways of getting non-lawyer capital that do not involve granting ownership rights."
- "[P]ressure to pursue business at expense of integrity and following the ethics rules."

On the other side of the coin were comments submitted in favor of the ABA NLO Proposal. These comments generally touched on similar rationales across all respondent populations – *i.e.,* improving access to legal services, increasing innovation and competition, increasing access to capital, a desire to keep pace with international markets, and beliefs that the ABA NLO Proposal had sufficient safeguards.

Small firm respondents offered comments in favor of the ABA NLO Proposal such as the following:

- "It's extremely limiting to restrict the profession to only partnering with lawyers."
- "As a small law firm, it may provide opportunity to gain increased business which is not extremely competitive."
- "In my business I am often paired with advisors whose services coincide with my services. An ability to market joint services would not only be beneficial to my business, but also clients would be better served."
- "The modernization of the legal profession requires access to capital which is not available under the current model."
- "[O]ther common law countries allow public listings of law firms . . . firms in the U.S. are at an extreme disadvantage."
- "[It] aids in succession issues so that an older partner may leave his interest to a family member who is not an attorney."

- "As a society, we are better off with less restricted, less expensive legal services . . . reduces restrictions and costs through a freer flow of capital and talent."

Large firm respondents made comments in favor of the ABA NLO Proposal such as the following:

- "Law firms are a business. So long as the rules of professional conduct are complied with, there is no reason other than history to restrict the ownership of this business."
- "Law firms will be more efficient if they can offer services by non-lawyers."
- "[Am a] member of the DC bar and worked in a firm with non-lawyer owners in the past…when well done, can be a very good partnership with benefits to clients and the justice system."
- "[W]e as lawyers are so protective of our own profession that we overlook that the world is 'bundled' now and clients want one-stop integrated services. . . . The current approach looks back instead of forward in a global economy and is not in line with EU models."

Corporate counsel comments included the following (interestingly, a number of comments referred to perceived benefits for small firms):

- "[B]etter competitive environment."
- "I think this will help smaller firms offer cost-effective services."
- "[W]ould broaden the pool of capital available to lawyers looking to start law firms and would allow for a larger pool of talent when searching for business

partners with proven skills in the areas of business administration, management and entrepreneurship."

It should be noted that a handful of respondents indicated that it was too soon for them to form an opinion, providing comments like "too early to tell" and "would want more info on what services the non-lawyer owners would be able to [do]."

In response to whether, if adopted, respondents would consider granting ownership interests to nonlawyers (in the case of law firms) or would consider it beneficial (in the case of corporate counsel), 77.1% of the total 1,211 respondents answered "no." Once again, small firm respondents had the largest majority in opposition among the three populations (82.5%), corporate counsel respondents had the smallest majority (66.3%), and large firm respondents fell in the middle (71.2%). Only 9.4% of all respondents reported that they were "not sure" whether they would grant nonlawyers ownership interests in their firm or would view it as beneficial. A larger percentage of corporate counsel respondents said they were "not sure" (20%), as opposed to large firm respondents (10.6%), and small firm respondents (8.2%).

Comments given in response to this question were similar to those expressed about the ABA NLO Proposal generally. The comments also provided insight into the practical applications and effect of adopting the ABA NLO Proposal.

On the one hand, small and large firm respondents who indicated that they would not consider retaining nonlawyer owners submitted comments such as the following:

- "My firm does not have enough specialized business which would support the need for these services. It makes more sense for us to contract for outside services as we need them." (Small firm)
- "I am in solo practice to be independent." (Small firm)

- "As solo practitioners, we already have to be extraordinarily diligent to avoid conflicts and maintain a practice within the guidelines of the Code of Professional Responsibility. I do not want to have to spend time monitoring the actions of a non-lawyer who may not care if I lose my license." (Small firm)
- "[T]he proposal sounds a lot like 'champerty,' pure and simple. The non-lawyer 'owner' in this proposed scenario exists only to profit from his supposed 'participation' in the legal endeavor." (Small firm)
- "I do not want my practice to be subject to the financial demands of investors who have no interest in representing clients on an independent and ethical basis, rather than as objects to be milked to reach a bottom line." (Large firm)
- "I am 'old' fashioned." (Large firm)
- "I would consider myself at risk in being partners with a non-lawyer. How can I ensure that he complies with the rules, when he does not have the same training as an attorney and he has no license at risk for his misdeeds." (Large firm)
- "Adding a non-lawyer looking for profit to our firm would definitely intensify the debate we already have – should we take on a case that we believe will benefit our community as well as our client even though it may involve considerable financial risk and years of legal services to prevail. That case will probably never be profitable." (Large firm)

On the other hand, small and large firm respondents who would consider granting ownership interests to nonlawyers made comments that included:

- "It would enable us to 'insure' that the employee would be less likely to seek employment elsewhere." (Small firm)

- "I could focus more on practicing law, and less on day to day running of a business." (Small firm)
- "For my firm, I am interested in offering discovery services. It would be a lot easier to get into that business with an equity partner in information technology." (Small firm)
- "[T]here are other skills that would benefit the firm, skills that might not have been acquired by a traditional lawyer. A non-lawyer might bring diverse information to a practice." (Large firm)
- "[It] will enable greater flexibility for interdisciplinary problem solving and facilitate the financial health of private practice." (Large firm)
- "Increased access to expansion capital." (Large firm)

Corporate counsel respondents who did not view nonlawyer ownership as beneficial offered comments that included the following:

- "I would probably cease using any law firm owned by non-lawyers."
- "I use outside counsel for legal work only, not in seeking business advice."
- "I will be very suspicious about that advice knowing there are investors/shareholders who are more profit driven."
- "I want the attorneys I use to be concerned only with me as a client. I do not want to have to wonder if the attorney is basing his decisions for me on the basis of earning a good return for his non-lawyer investors."
- "[It] would place a burden on in-house counsel who would need to research non-lawyer owners in the firms under consideration to avoid potential conflicts of interest which would otherwise exist."

- "[P]oor legal advice."
- "[T]he shareholder of my lawyers may be the competitor of my company."

On the other hand, corporate counsel also expressed views that extending nonlawyer ownership rights would be beneficial, including:

- "Should also reduce costs of cases involving experts."
- "Would allow my outside attorney advisors to use, e.g., CPA to provide numerical calculations to support the attorney's advice."
- "Reduce costs."
- "Shorten time to trial or arbitration; ensure experienced testimony or advice on nonlegal aspects of case."

The surveys' request for "any additional comments" provided further insight on respondents' views, revealing some of the most candid reactions, and making it clear that the issue evoked strong feelings across all populations.

On the one hand, survey respondents' comments in opposition included:

- "I feel very strongly that the NYSBA should not support this move. It will further dilute the public's image of the legal profession – which should be about helping non-lawyers navigate our civil and criminal justice system, but is more and more perceived by the public as simply a way to exploit the struggles of individuals for the benefit of the elite. Focus more on how we can regain our stature in the community, please?" (Small firm)
- "It is difficult enough to police the practice of law when it is limited to admitted attorneys." (Small firm)
- "This is a slippery slope." (Small firm)

- "I am surprised at the ABA and very disappointed in them. . . to promote what will be the ultimate demise of the profession is astonishing and a testament to the fact that they have lost their way." (Large firm)
- "[T]he question should be not how would the proposal benefit the firm, but how does the proposal benefit the client." (Large firm)
- "This is all about greed for the few and not about delivering more efficient, effective, counseling to the majority of citizens at a reasonable fee." (Large firm)
- "[T]he burden should be on those proposing this change to show why the legal profession needs nonlawyer owners." (Corporate counsel)
- "[W]ill discontinue my membership should the ABA adopt this rule." (Corporate counsel)

On the other hand, additional comments in support included:

- "Please make this proposal happen. I think it's a shame that we're needlessly limiting business when our economy is struggling so immensely." (Small firm)
- "Much has happened since 2000, including the report in the UK from Sir David Clementi that formed the basis for the UK Legal Services Act. We need to be alert to these changes and be prepared to respond to them in appropriate ways, o[r] we are going to be left behind." (Small firm)
- "Although some might argue it is a first step down a slippery slope, the District of Columbia has not slid further down that slope in 20 years." (Large firm)
- "Legal Services has a lot of people on our Board of Directors who are not lawyers, and I think it works out ok." (Large firm)

- "The UK recently allowed ABS and my organization is one that is looking to take advantage of that. The bar should be open to innovative structures and focus on ensuring the ethical practice of law within those new structures." (Corporate counsel)
- "We have professional standards to be upheld AND ENFORCED, and a non-lawyer ownership interest could encourage morality at a higher standard outside the law." (corporate counsel) (emphasis in original)

In sum, the survey revealed that most respondents, whether from small firms, large firms or corporate counsel, did not support adopting the ABA NLO Proposal in New York. While this survey does not purport to represent a statistically representative sample, it is reasonable to infer that the reasons and comments expressed by the respondents are reflective of both the positive and negative opinions of the larger population of New York-licensed attorneys.

VII. Positions of Other States and Committees

In addition to our NLO Task Force, several committees and bar associations from other jurisdictions or from NYSBA sections have issued formal opinions or reports in response to the ABA's nonlawyer ownership proposals. The Task Force has considered each of the positions from these associations, sections and committees of which we are aware, each of which is summarized in this section. In addition, substantial comments were posted on the Ethics 20/20 Commission's website.[156]

[156] Comments *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/alps_working_group_comments_chart.authcheckdam.pdf.

A. *Opinions in Opposition*

1. *New Jersey*

In a January 2012 Report, the New Jersey State Bar Association's Professional Responsibility and Unlawful Practice Committee recommended that the Association's Board of Trustees oppose the ABA's then-existing proposal on nonlawyer ownership of law firms.[157] The Committee consists of lawyers from various fields of the profession.

The New Jersey Report concisely stated several bases for opposing the ABA NLO Proposal. The Report noted that the existing system serves the public well and requires personal accountability of lawyers to the judiciary.[158] It emphasized that no Committee member knew of an interest by the local bar, the business community, or general public in allowing nonlawyer ownership.[159] It also noted that the existing rules governing law firm ownership already permit firms to employ nonlawyers and compensate them as they see fit.[160] The New Jersey Report emphasized a general concern about "encroachment on attorneys' accountability and independent professional judgment," and a concern that the proposal "may be tantamount to MDP in sheep's clothing," which New Jersey has long opposed.[161] Overall, the New Jersey Report position can be summarized in its statement that the Committee was "wary of changing the status quo without good reason to do so."[162]

The New Jersey Report was adopted by the New Jersey State Bar's Board of Trustees in January 2012.

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[157] NJSBA Report of the Prof'l Responsibility and Unlawful Practice Comm. on Ethics 20/20 Proposal to Permit Non-Attorney Ownership of Law Firms (January 25, 2012). One committee member, Steven M. Richman, lodged a minority position in favor of the proposal, in which he criticized the Report's "categorical rejection" of the proposal's effort to "address the reality of the global practice of law while insisting on adherence to local ethical standards." He viewed the proposal as "appropriate, necessary and sufficiently protective of the issues raised in the [Report]."
[158] *Id.* at 1.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 2.
[162] *Id.* at 1.

2. *Illinois State Bar Association*

In March 2012, the Illinois State Bar Association ("ISBA") adopted a resolution opposing the ABA's proposals to change Model Rule 1.5 and Model Rule 5.4(b).[163] The Resolution set forth two ISBA policies: "permitting the sharing of legal fees with non-lawyers or permitting ownership and control of the practice of law by non-lawyers threatens the core values of the legal profession"; and it is ISBA "policy to oppose any effort by the American Bar Association to change the Model Rules of Professional Conduct to permit lawyers to share legal fees with non-lawyers or permit law firms directly or indirectly to transfer ownership or control to non-lawyers over entities practicing law."[164]

The Illinois Resolution recited that the changes proposed by the Ethics 20/20 Commission would be inconsistent with both prior ABA policy established in July 2000, as well as Illinois Rule of Professional Conduct 5.4.[165] Further, the Resolution noted that "there has been no demonstrated need or demand from the public or profession for such changes in the Model Rules" and that the sharing of legal fees with nonlawyers adversely impacts core values of the profession such as the exercise of independent judgment and regulation by the judiciary.[166] The Illinois Resolution affirmed and proposed that the ABA affirm and re-adopt "the policy adopted by the American Bar Association in July, 2000, to wit:

> The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring

[163] ISBA Resolution Opposing Certain ABA Ethics 20/20 Proposals And/Or Working Drafts of Proposals and Affirming and Re-Adopting Policy on Fee Sharing and Non-Lawyer Ownership and Control of Law Practices (March 2012).
[164] *Id.*
[165] *Id.*
[166] *Id.*

to non-lawyers ownership or control over entities practicing law should not be revised."[167]

ISBA further resolved that the ABA should reject all proposals to amend Model Rules 1.5 and 5.4 and to permit publicly traded law firms, nonlawyer ownership of or investment in law firms, and multidisciplinary practice.[168]

In June 2012, together with the ABA's Senior Lawyers Division, ISBA filed a Report and Resolution (denominated ABA Resolution 10A) with the ABA's House of Delegates urging the ABA to re-adopt its 2000 House of Delegates Resolution "particularly at a time when technological advances and globalization are pressuring the profession to lessen its commitment to the public and to professional independence."[169] The Report reminded the ABA of the core principles and values set forth in the 2000 Resolution.[170] With regard to the Ethics 20/20 Commission's proposed changes to Rules 1.5 and 5.4(a) on choice of law, the Report emphasized that "[i]f adopted by the House, this would amount to an approval of nonlawyer fee splitting and ownership" which is inconsistent with the policies of all 50 states.[171] The Report urged that because the 20/20 Commission had expressed its intention to continue considering the ABA Choice of Law Proposal (after removing from consideration the ABA NLO Proposal), it was imperative that the House of Delegates give guidance as to how the Commission should proceed. The Report also stressed the importance of reaffirming the ABA policy because wide public distribution of the Commission's nonlawyer ownership proposals had fostered public perception that the profession desires to adopt nonlawyer ownership.[172] The Report urged the

[167] *Id.*
[168] *Id.*
[169] ABA, ISBA and the Senior Lawyers Div. of the ABA Report to the House of Delegates, Resolution (Aug. 2012) (hereinafter referred to as "Resolution 10A").
[170] *Id.* at 2.
[171] *Id.* at 5 (emphasis in original).
[172] *Id.*

ABA to avoid the "evils of fee sharing with nonlawyers" and emphasized that lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law.[173]

Resolution 10A was supported by the ABA's Young Lawyers Division, the Maryland, Indiana, Mississippi, North Carolina, New Jersey, Oregon, Nevada, Iowa and South Dakota bar associations and the National Conference of Women's Bar Association.

Prior to its August 2012 meeting, the ABA House of Delegates distributed a "point/counterpoint" discussion regarding Resolution 10A, with contributions from proponents and opponents. John Thies (ISBA) and Richard Thies (ABA Senior Lawyers Division) authored the proponent opinion. Michael Traynor and Jamie Gorelick (on behalf of the Ethics 20/20 Commission) authored the opposition opinion.

The proponent opinion urged that the Resolution be debated and voted on at the ABA's Annual Meeting in Chicago, citing the same reasons set forth in the Resolution itself. The opposition opinion cited three reasons to oppose Resolution 10A. First, in contrast to the position of the proponents, the Commission is unambiguously not recommending "a change in ABA policy on nonlawyer ownership in law firms." Second, there is "no need for a 'public clarification' regarding ABA policy." Third, "Resolution 10A would foreclose the House of Delegates from even considering related proposals on conflict of rules that the Commission has not yet decided to make and that would not come before the House until February 2013." The opposition position emphasized that it would be "bad practice" to take preemptive action to foreclose consideration of the issue before all views were fully presented. Further, all members of the Ethics 20/20 Commission, even those who voted against altering the prohibition on

[173] *Id.*

nonlawyer ownership, felt that consideration of the choice of law issue should proceed for consideration.

At the ABA House of Delegates meeting in August 2012, the House passed a motion to postpone indefinitely consideration of Resolution 10A.

3. *NYSBA Trusts and Estates Law Section*

In response to a request by the Section's Executive Committee and the Task Force's solicitation of comments, in March 2012, the Practice and Ethics Committee of the Trusts and Estates Section issued a report on the ABA's NLO Proposal.[174] The report summarized a survey of members of the Section's Executive Committee, members of the Practice and Ethics Committee and NYSBA's Trusts and Estates listserv. It concluded that this practice area does not favor the ABA's proposal.[175]

The Committee's main inquiry was to measure the extent of demand for the proposed change among law firms and their clients. To that end, the Committee issued a survey posing four questions:

(1) In your T&E practice, do you employ non-owner professionals in the delivery of legal services?

(2) In your T&E practice, would you offer ownership interests to recruit and retain non-lawyer expertise?

(3) In your T&E practice, would you expect that non-lawyer ownership would increase the accessibility of your legal services to the public?

[174] Memorandum to Exec. Comm. from Practice and Ethics Comm. re: Report on the Dec. 2, 2011 ABA Discussion Paper on Alt. Law Practice Structures Re Proposal to Amend Rules of Prof'l Conduct to Permit Non-Attorney Partners (March 2, 2012).
[175] *Id.* at 1.

(4) Do you support the proposed ABA amendment to Rule 5.4 of the Rules of Professional Conduct?[176]

The Committee reported receiving 27 survey responses, which revealed the following: 59.3% of respondents did not employ non-owner professionals; 88.9% of respondents would not offer ownership interests to recruit nonlawyer expertise; 81.5% of respondents would not expect nonlawyer ownership to increase accessibility to legal services; and 74.1% of respondents did not support the ABA NLO Proposal.[177]

Comments from survey participants included the following: "attracting talent can be achieved through contractual means"; "the ABA [NLO] proposal does not go far enough"; "[t]here is no effective mechanism to enforce non-attorney partner compliance with the Rules of Professional Conduct"; "this change would be contrary to our core values and ethical obligations as attorneys"; and "the ABA should explore options that would allow U.S. firms to compete internationally in a way that does not permit U.S. firms, or the U.S.-based component of a multi-jurisdictional firm, to offer partnerships to non-lawyers or be influence[d] by non-lawyer interests."[178]

The Committee's report concluded that based on the survey results, NYSBA's existing reservations about commingling business and legal interests, the inability to redress violations of ethical rules by nonlawyers, and the existing ability to contract with nonlegal professionals, the Trusts and Estates Section should oppose the ABA's proposal.[179]

In March 2012, the Section's Executive Committee adopted the Committee's Report.

[176] *Id.* at 3.
[177] *Id.* at 3-4.
[178] *Id.* at 4-5.
[179] *Id.* at 5.

B. *Opinions in Favor*

1. *NYSBA International Section*

In March 2012, the Executive Committee of NYSBA's International Section adopted a Report supporting the ABA NLO Proposal, while also recommending that the proposal be more expansive.[180] The International Section reported that its members consist of lawyers licensed in New York, as well as other states, and internationally. To prepare its Report, the Section formed a Subcommittee of four members to gather input from Section members.[181]

As background, the Report recognized that nonlawyer ownership was preferable to existing threats to the current legal system. These threats include improper influence exerted from banks through direct financing of litigation, document production websites like Legal Zoom and Rocket Lawyer, and non-conventional legal service providers or "alternative" models like Axiom.[182]

The Subcommittee considered the experience of Slater & Gordon, a law firm with offices in Australia and the UK that went "public" in 2007. The Report noted that the Subcommittee had not heard any evidence of shareholder pressure that caused the firm to dilute its professional commitments.[183] The Subcommittee also considered the experience in the UK, which allows both multidisciplinary practice and alternative business structures pursuant to the Legal Services Act of 2007.[184] The Report indicated that over the course of several years, Section members have engaged in discussions with members of the UK bar.[185] The Subcommittee also stated that it was influenced by a desire to reduce "perceived restricted trade practices of lawyers."[186]

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[180] NYSBA Int'l Section Task Force on Non-Lawyer Ownership Interim Report (Feb. 24, 2012).
[181] *Id.* at 1.
[182] *Id.* at 2-3.
[183] *Id.* at 3.
[184] *Id.*
[185] *Id.*
[186] *Id.* at 4.

The Report identified certain issues that the Section remained concerned about. First, having heard of an instance where a U.S. firm was denied protection of Swiss professional secrecy laws due to its LLP status, the Section expressed concern about "moves to erode the attorney/client privilege, particularly in Europe."[187] The Report also recommended a "fit and proper test" which all law firm owners (both lawyers and nonlawyers) would be required to meet.[188]

After setting forth the Section's considerations and concerns, the Report made seven "findings."[189]

First, given the International Section's unique composition, the Report recommended that NYSBA regularly consult with the International Section as thoughts develop on issues relating to nonlawyer ownership.[190] *Second*, the ABA's previous rejection of publicly traded law firms, passive nonlawyer investment, and multidisciplinary practice should be revisited. According to the Report, the ABA NLO Proposal was too conservative, and external investment is not likely to be any more harmful than sharing fees with a nonlawyer professional.[191] *Third*, the Report found that the "imposition of ethical duties on nonlawyers needs clarity," and that nonlawyer compliance with ethical rules needs certainty.[192] *Fourth*, the Report sought clarity on the possibility of foreign lawyers as nonlawyer owners in a firm.[193] *Fifth*, the Report recommended that the ABA issue a one-page executive summary to engage busy lawyers and members of the

[187] *Id.*
[188] *Id.* There is no specific definition of "fit and proper" in the Report, but the reference is likely to the LSB's "Fit and proper person policy." Legal Services Board, L&P 017 Fit and proper person policy – v2.0 (2012), *available at* http://www.lsb.vic.gov.au/documents/L-P017FitandProperPersonPolicy-V2.pdf; *see also supra* note 136 and accompanying text (discussing "fit to own" test).
[189] The Report pointed out some minor errors in the ABA report. For example, the Solicitors Regulatory Authority regulates the solicitors' profession in both England and Wales, and not just England, as the ABA paper mistakenly indicated.
[190] *Id.*
[191] *Id.* at 4-5.
[192] *Id.* at 5.
[193] *Id.*

public.[194] *Sixth*, the Subcommittee found evidence that the U.S. system needs to be modernized, as reflected by the fact that three U.S. law firms have registered with the UK as Legal Disciplinary Practices ("LDPs").[195] *Seventh*, no disciplinary problems with LDPs have been reported in the UK, which suggested no evidence of diminished professional responsibility from their nonlawyer ownership scheme.[196]

In sum, the Report advocated modernization of the legal profession, which would include models of law firm ownership previously prohibited in New York. Otherwise, the Report expressed concern that the U.S. may lose ground and law firms may relocate overseas.[197]

The Report was adopted by the International Section in March 2012.

One month later, in April 2012, the Executive Committee adopted a second report ("Supplemental Report") concerning NYSBA Ethics Opinion 911 and choice of law issues.[198] In sum, the Committee expressed its belief that "New York lawyers must be able to affiliate, as employees or partners, with US and non-US law firms that comply with the ownership rules of their home jurisdiction, regardless of whether those ownership rules permit non-lawyer ownership or not."[199] The Supplemental Report raised concern that the impact of Opinion 911 will affect New York as a major international legal center, insofar as it places a disincentive on foreign firms from continuing to engage New York lawyers or maintain branch offices in New York. The Section feared that, as a result, New York may lose its preferred status as a legal center to more favorable jurisdictions, such as D.C.

[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 6.
[198] NYSBA Int'l Section Report on Non-Lawyer Ownership (April 12, 2012).
[199] *Id.*

As it concerned the ABA Choice of Law Proposal, the Section supported adoption of the proposal, urging that, at a "bare minimum," the proposal is "***essential*** " if New York does not change its position on nonlawyer ownership.[200] Further, it noted that "such affiliation should be permitted regardless of the predominant jurisdiction in which, or with respect to which, the lawyer or foreign legal consultant performs services."[201]

On October 26, 2012, the Section issued a comment paper to the Task Force Report in which it supported the adoption of the Task Force Report but urged NYSBA's House of Delegates to appoint a new task force to reconsider the issues.[202] According to the Section's comments, such task force should be charged with adopting recommendations that will:

> (a) Preserve and enhance New York as a center for the practice of international law;
>
> (b) Provide for the independence of New York lawyers from nonlawyer controls that could compromise professional ethical standards and integrity, including those that can now exist as a result of debt financing; and
>
> (c) Develop rules and ethical standards applicable to law firms with nonlawyer ownership to ensure the continued maintenance of professional and ethical standards.[203]

The Section further advised that it resolved to appoint a Task Force within the Section to "continue to study the potentially conflicting obligations of lawyers exposed to inconsistent

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[200] *Id.* (emphasis in original).
[201] *Id.*
[202] Comment of the International Section, NYSBA to the Proposed Report and Recommendation of the Task Force on Nonlawyer Ownership (Oct. 26, 2012).
[203] *Id.* at 3.

jurisdictional rules governing affiliation with non-NY firms with permitted nonlawyer ownership and consider means of effectively and fairly addressing these potential conflicts."[204]

2. *NYSBA Commercial and Federal Litigation Section*

In July 2012, the Committee on Ethics and Professionalism of NYSBA's Commercial and Federal Litigation Section issued a Report to the Section's Executive Committee in which it recommended endorsing the Ethics 20/20 Commission's proposed amendments to Rule 1.5(e), while recommending revisions to the proposal to amend Rule 5.4(a).[205] This Report superseded prior draft reports in which the Committee had recommended endorsing all changes to Rule 1.5 and 5.4(a).[206]

The Committee endorsed the ABA's proposed changes concerning inter firm fee sharing, as expressed in the amendment to Rule 1.5(e), because "it helps clients get multijurisdictional advice, it frees attorneys from the difficult task of policing the compensation policies and ownership structure of independent firms in foreign jurisdictions, and it does not interfere with the ability of New York lawyers to make judgments for the benefit of their clients free from the influence of non-lawyer members of the foreign firms."[207]

The Committee recommended restricting the ABA's proposed amendment to Rule 5.4(a) on intra firm fee sharing, such that nonlawyers in the same firm would be permitted to share fees only if the following criteria are met:

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[204] *Id.* at 6.

[205] Report of the Ethics and Professionalism Comm. of the Commercial and Fed. Litig. Section of NYSBA on the ABA Proposal for Comment on Choice of Law – Alt. Law Practice Structures (July 26, 2012).

[206] *See, e.g.*, Report of the Ethics and Professionalism Comm. of the Commercial and Fed. Litig. Section of NYSBA, (June 8, 2012). The draft report viewed the changes as "advisable and necessary" to provide guidance to practitioners and address the "practical reality that some jurisdictions allow non-lawyer members." That report also noted a lack of empirical evidence of instances where nonlawyers in a firm influenced legal advice given to a client, and that "lawyer independence does not seem to be compromised."

[207] *See supra* note 205, at 2.

(1) the non-lawyer owners are in a foreign jurisdiction that permits non-lawyer ownership;

(2) non-lawyer owners do not have the ability to control the management of the firm as a whole;

(3) non-lawyer owners do not sit on the compensation committee or play any role, directly or indirectly, in decisions relating to the compensation of attorneys admitted to practice or working in jurisdictions that prohibit non-lawyer ownership; and

(4) the non-lawyer performs professional services that assist the firm in providing legal services to its clients.[208]

In suggesting these limitations, the Committee expressed its concern that the modified Rule 5.4, as originally proposed by the Ethics 20/20 Commission, would lead to effective ownership and control by foreign nonlawyers over New York law firm offices.[209]

The Committee's report was adopted by the Section's Executive Committee in August 2012.

3. *New York City Bar Association Committee on Professional Responsibility*

In July 2012, the New York City Bar Association's Professional Responsibility Committee sent the Task Force a comment letter on the Ethics 20/20 Commission's proposed amendments to Rules 1.5 and 5.4, in which the Committee expressed support for the ABA's proposal.[210]

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[208] *Id.* at 3.
[209] *Id.* at 2.
[210] Letter from David Lewis, Chair of the City Bar Comm. on Prof'l Responsibility, to Stephen P. Younger, Chair, NYSBA Task Force on Nonlawyer Ownership (July 23, 2012) (quoting NYSBA Comm. on Prof'l Ethics Opinion 911 (Mar. 14, 2012).

The Committee made several observations about the Ethics 20/20 Commission's proposal. These observations included: Model Rule 8.5(b)(2) currently focuses on the rules of the jurisdiction in which either the conduct occurred or the predominant effect of the conduct is felt; the Ethics 20/20 Commission found no evidence of undue influence by nonlawyers upon lawyers in separate firms or firms in other jurisdictions where nonlawyer ownership is prohibited; and, since fee sharing is already occurring within firms through "accounting gymnastics," the practical realities of legal practice necessitate a rule that explicitly allows for sharing of fees.[211]

The Committee then provided its own analysis by comparing New York's Rules of Professional Conduct with the ABA Model Rules relevant to the issues. Specifically, the Committee noted that Rules 1.5(g) and 5.4 are both similar to the ABA's version of the rules, that NYSBA Ethics Opinion 911 concludes that "a New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers," and that N.Y. Rule 8.5(b)(2)(ii), like ABA Model Rule 8.5(b)(2), effectively permits fee sharing with lawyers or firms in other jurisdictions where nonlawyer ownership is permitted only if the "predominant effect" of the conduct takes place in that other jurisdiction.[212] The Committee noted that no empirical or other evidence demonstrated improper influence of nonlawyers where the nonlawyers are exclusively associated with firms, or firm offices, located outside New York.[213] Further, practical considerations suggest that New York firms currently have sister offices in nonlawyer ownership jurisdictions and that such firms would be required to maintain fiscal and managerial separation from a sister office. Finally, the Committee was

[211] *Id*. at 2-3.
[212] *Id*. at 4-5.
[213] *Id*. at 5.

unaware of any New York firm being "publicly disciplined for maintaining a separate office with nonlawyer owners in a jurisdiction that permits nonlawyer ownership."[214]

In sum, the Committee opined that "it is appropriate and desirable for the legal profession to proactively address and resolve issues raised by the disparate professional rules concerning fee-sharing with nonlawyers." The Committee noted that "[l]eft unresolved, these issues may present an opportunity for a regulator outside the profession to seek to fill a perceived regulatory void."[215] According to the Committee, New York lawyers currently face the choice of law issues implicated by the rules that inform the ABA Choice of Law Proposal and would benefit from guidance.[216]

4. *NYSBA Committee on Standards of Attorney Conduct*

On October 3, 2012, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"), chaired by Joseph E. Neuhaus, submitted a memo to the Task Force in support of the Inter Firm Fee Sharing Proposal. By a vote of 14-6, COSAC adopted a position in support of the proposal.

Specifically, COSAC observed that the proposed Comment [9]

> addresses in a practical way the problem presented by the fact that some jurisdictions now permit limited nonlawyer ownership of law firms while others do not. The instances in which such fee sharing will arise are relatively limited – principally, where a lawyer in one jurisdiction retains local counsel in another or refers the work on a matter to another lawyer in the relevant jurisdiction more qualified to handle the matter while retaining joint responsibility for the matter. Rule 1.5(e). [internal citation omitted]. The

[214] *Id.*
[215] *Id*. at 6.
[216] *Id.*

> Comment clarifies that in such situations the fact that a non-lawyer owner of the other firm might receive a portion of the profits of that firm that stem indirectly from the fees shared by the in-state lawyer is too attenuated a path to qualify as sharing a fee with the non-lawyer owner – just as the receipt by a law firm's employees or contractors of income that can be traced to legal fees does not amount to prohibited sharing of fees with a non-lawyer.

COSAC's comments continued:

> The proposed Comment properly emphasizes that a lawyer must at all times retain the ability to exercise independent professional judgment and may not allow a nonlawyer to direct or regulate the lawyer's independent judgment. Thus, a New York firm would be permitted to share fees with a District of Columbia firm that has a nonlawyer partner, provided the lawyers in the New York firm maintain their independent professional judgment on behalf of the mutual client being served by both law firms and provided both firms were otherwise permitted to share fees in the matter.

According to COSAC, Comment [9] does not diverge from what historically has been understood as acceptable fee sharing arrangements – the agreement is consensual and confirmed in writing by the client, both firms serve a mutual client and both firms have to comply with their jurisdiction's applicable ethics rules. Further, COSAC observed that making accommodation for cross-border co-counsel (which it contended already exists to some extent) "will not present undue risks of nonlawyer influence on the practice of law by lawyers in such firms" and that the risk of "improper influence" is "significantly reduce[d] since a nonlawyer owner would have to extend his or her influence to a separate firm."

VIII. Task Force Observations and Recommendations

A. *Task Force Observations*

In this section of the Task Force Report, the Task Force has attempted to compile its observations about the various strengths and weaknesses of the proposals issued by the Ethics 20/20 Commission concerning nonlawyer ownership structures and choice of law issues. As noted above, the Task Force heard from many extremely knowledgeable and thoughtful speakers. Those speakers were diverse with respect to legal practice background, geography and viewpoints on the issues. Following research conducted by the Task Force, the Task Force members discussed their views on these issues. While each member may have had a specific reason or reasons in voting on the issues, the below observations were discussed by the group as a whole.

1. *Nonlawyer Ownership as an Alternative Structure for Legal Practice*

Some proponents of nonlawyer ownership contend that a nonlawyer ownership model could provide easier access to legal services for those otherwise unable to afford them, and provide several new opportunities for lawyers and law firms to better serve the public.[217] The Working Group for the Ethics 20/20 Commission reported that it had "heard anecdotal evidence from lawyers who advise District of Columbia law firms on arrangements for admitting nonlawyers to their partnerships that law firms, and small law firms in particular, are increasingly interested in having nonlawyer partners."[218] Ethics 20/20 Commission stated that, "[t]hese firms believe that there is or will be client demand for the legal services that firms with

[217] Ethics 20/20 Discussion Draft on NLO, at 9; *see also* George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 845 (2001); Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L. J. 669, 689–90 (2009).
[218] *Id*. at 2.

nonlawyer partners are well-positioned to provide."[219] Examples cited by the Ethics 20/20 Commission "include law firms that focus their practice on land use planning with engineers and architects; law firms with intellectual property practices with scientists and engineers; family law firms with social workers and financial planners on the client service team; and personal injury law firms with nurses and investigators participating in the evaluation of cases and assisting in the evaluation of evidence and development of strategy."[220] In contrast, the D.C. Bar officials who presented to the Task Force revealed that there was minimal real world usage of this model in D.C.[221] The Task Force survey did not provide support for the notion that there is a strong need for alternative structuring in New York law firms.

Proponents of nonlawyer ownership have also argued that such a regime "permit[s] nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee."[222] Comment 7 to District of Columbia's Rule 5.4 provides the following examples: "the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions."[223] The Working Group for the Ethics 20/20 Commission reported that it had heard anecdotal evidence from small firms that they could better recruit technology experts if they could offer them a partnership interest in a law firm. According to the Working Group, this, in turn, would allegedly "help them innovate

[219] *Id*.
[220] *Id*.
[221] *See infra* Appendix A, at A-13-14.
[222] D.C. Rule of Prof'l Conduct 5.4, Comment 7.
[223] *Id*.

by harnessing new technologies, thus responding to accelerating demand."[224] However, N.Y. Rule 5.4(a)(3) already permits a lawyer or law firm to "compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement." In this manner, profit sharing with such nonlawyer experts is currently permitted.

Thus, it cannot be that nonlawyer ownership is just about money and financial structuring of law firms.[225] Rather, it is the concept of allowing nonlawyers to exercise "ownership" over a legal practice that lies at the heart of this debate. Thus, there is not strong support for allowing such ownership at this time.

2. *No Compelling Need*

Despite efforts to seek out voices who would speak for and articulate the "need" for nonlawyer ownership, the Task Force was unable to establish that there is any compelling "need" for alternative practice structures in New York such as nonlawyer ownership at this time. As noted in the survey results discussed in Section VI above, the Task Force did not observe any

[224] Ethics 20/20 Discussion Draft on NLO, at 2.

[225] The financial aspect of the prohibition on nonlawyer ownership has been raised in litigation brought by the law firm of Jacoby & Meyers. In *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep't's, Appellate Div. of Supreme Court of New York*, 847 F. Supp. 2d 590 (S.D.N.Y. 2012), Jacoby & Meyers LLP sought a declaration that New York's Rule 5.4 is unconstitutional. The firm argued, among other things, that the prohibition on non-lawyer equity investment imposes higher capital costs and, therefore, impairs the firm's ability to expand "their mission to provide lower cost legal services to those who cannot afford more traditional lawyers." *Id.* at 591. The court granted the defendants' motion to dismiss the complaint because the firm lacked standing to challenge the constitutionality of the Rule. *Id.* at 598. According to court records, the plaintiff filed a notice of appeal on April 5, 2012. The parties have exchanged appellate briefs and oral argument is scheduled before the Second Circuit on October 5, 2012. *Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third and Fourth Dep't's*, App. Div. of Sup. Ct. of N.Y. (S.D.N.Y. 2012), *appeal docketed*, No. 12-1377 (2d Cir. Apr. 9, 2012). Jacoby & Meyers commenced similar actions in New Jersey and Connecticut. *See Jacoby & Meyers Law Offices, LLP v. Justices of the Sup. Ct. of N.J*., No. 11-2866 (D. N.J., filed May 18, 2011); *Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Super. Ct*., No. 11-817 (D. Conn., filed May 18, 2011). On March 7, 2012, the United States District Court in New Jersey denied defendant's motion to dismiss, remitting the issue of whether an alternative business structure may exist under Rule 5.4(d) of the New Jersey Rules of Professional Conduct to the New Jersey Supreme Court for their review and analysis. The District Court retained jurisdiction over the federal constitutional issues and stayed the case until such time as a party seeks to reopen the matter. *Jacoby & Meyers Law Offices, LLP v. Justices of the Sup. Ct. of N.J*., No. 11-2866 (D. N.J. March 7, 2012) (order denying motion to dismiss). Oral argument was held in the Connecticut action on March 23, 2012, but there is no subsequent history in the matter as of this writing. *See Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Super. Ct*., No. 11-817 (D. Conn., filed May 18, 2011).

groundswell of support to adopt nonlawyer ownership in New York. While the Task Force did hear from bar leaders who believed that nonlawyer ownership could serve the profession well, the arguments put forth by most of these leaders spoke about the potential policy-level benefits of nonlawyer ownership as an alternative practice structure – such as improving access to justice or keeping pace with other countries. It is possible that the absence of any expression of a compelling need for nonlawyer ownership of law firms in New York was due to the lack of any meaningful empirical New York data on this issue and the extremely limited experience most practitioners have with these structures. But it is also consistent with the fact that the ABA decided to drop its original NLO Proposal.

3. *No Empirical Data*

It is critical to note that there simply is a lack of meaningful empirical data about nonlawyer ownership of law firms and what its potential implications are for the future of the legal profession in New York. No form of nonlawyer ownership has been allowed in New York and we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force's ability to study the issue as it was difficult to assess past experience.

The only, albeit limited, experience that U.S. lawyers have with nonlawyer ownership of law firms is in Washington, D.C. The District of Columbia has permitted nonlawyer ownership since 1990 without any corresponding increase in disciplinary complaints.[226] However, the Task Force also learned that nonlawyer ownership is used relatively little in D.C. Similarly, while LDPs have been permitted in England and Wales since March 29, 2009, apparently no

[226] Ethics 20/20 Discussion Draft on NLO, at 9.

disciplinary problems with LDPs have been reported through November 2011.[227] Nonetheless, it is simply too early to measure the success of these structures at this time.

Most Task Force members recognized that having more empirical data on nonlawyer ownership would be useful in assessing the issues. This is one of the most compelling reasons for future study as additional jurisdictions adopt forms of nonlawyer ownership.

4. *No External Pressures for Change*

International bar leaders told us that each adoption of nonlawyer ownership in their jurisdiction came about due to outside forces, either economic or governmental, which thrust the change upon the profession. The Task Force did not identify any jurisdiction that had recently adopted a form of nonlawyer ownership where the catalyst for that change came about as a result of a movement from within the profession. For example, the change in the UK came about due to the government's desire to promote competition in the legal market.

In the U.S., regulation of the profession has traditionally been handled at the State level of government. We are not aware of any governmental or other outside forces pressing for change in law firm ownership structures in New York.

5. *Concerns About Professionalism*

One of the most significant concerns for many Task Force members was the impact that nonlawyer ownership of law firms would have on "Professionalism." In one sense, professionalism is an individual responsibility of each and every lawyer. Thus, it is conceivable that an individual lawyer should still be able to uphold the highest standards of professionalism despite participation in a practice structure incorporating nonlawyer ownership. However, the vast majority of Task Force members observed that it was not worth taking the risk of impacting the core values of our profession by allowing nonlawyers to hold equity interests in law firms.

[227] *Id*.

While professionalism is the responsibility of each and every individual lawyer, it goes beyond each lawyer. Professionalism informs how the profession is regulated as a whole and how our profession is viewed by the public. Despite the fact that there may be missed financial opportunities for lawyers and nonlawyers by not taking advantage of nonlawyer ownership, it is more consistent with the core values of our profession to continue to keep the concept that "ownership" of legal practices is an independent right to be exercised only by lawyers.

6. *Choice of Law Problems and Opinions 889 and 911*

While the Task Force did not observe any need to embrace nonlawyer ownership in New York at this time, there was greater recognition of the concerns related to the choice of law issues identified above. Given the continued increase in interstate and international law practice, New York lawyers need guidance on the ethical issues involved in associating with law firms outside New York that have nonlawyer owners and managers. Today, multijurisdictional law firms are governed by different rules regarding the permissibility of nonlawyer ownership based on their geography, which creates thorny problems for New York lawyers and law firms. Different permutations of these problems arise when New York lawyers or law firms associate with lawyers, law firms, or branch offices of such New York law firms located in jurisdictions that do permit nonlawyer ownership.[228]

For example, in Opinion 889, discussed in section II.F. above, NYSBA's Committee on Professional Ethics opined that a New York attorney who was admitted and principally practicing in a firm in the District of Columbia could ethically conduct litigation in New York if he belonged to a District of Columbia partnership that included a nonlawyer who would benefit from the resulting fees. By contrast, in Opinion 911, also discussed in section II.F., above, the Committee opined that the inquirer, who was a New York attorney practicing law from a New

[228] For example, there are issues regarding referral fees that arise with regard to nonlawyer-owned firms.

York office on behalf of New York clients, could not be employed by an out-of-state entity that has non-lawyer owners or managers. Other opinions in New York condone sharing of fees between lawyers licensed in New York with lawyers who are licensed in another state or country, but who are not licensed in New York, under certain conditions.[229]

As these Opinions demonstrate, New York lawyers face a multitude of choice of law and other ethical issues implicated by disparate jurisdictional rules on nonlawyer ownership, which led to Ethics 20/20 discussion drafts relating to potential amendments to ABA Model Rules 1.5(e) and 5.4. In addition, New York needs to be cautious about unduly inhibiting foreign law firms from setting up branch offices within the State. Left unresolved, these ethical issues may present an opportunity for an external regulator to seek to fill a perceived regulatory void. As a result, these issues are worthy of further study and analysis by the appropriate NYSBA committees as nonlawyer ownership develops in other jurisdictions.

Nonetheless, the Task Force concluded that there was a need to draw a sharp line against nonlawyer ownership at this time. The Task Force was also concerned that the ABA Choice of Law Proposal lacked protections against potential abuse of the proposed new rule and would undermine the current predominant effects test. The view of a majority of the Task Force was that if New York chooses not to allow nonlawyer ownership, it should not be allowed in through the back door under a choice of law rule and thereby allow professionalism concerns to erode.

The Task Force's initial concerns surrounding choice of law applied to both intra firm and inter firm fee sharing, the former proposal having been subsequently withdrawn by the Ethics

[229] *See* NYSBA Comm. on Prof'l Ethics, Op. 864 (2011) ("A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g)."); NYSBA Comm. on Prof'l Ethics, Op. 806 (2007) ("A New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with [Rule 1.5(g).]).

20/20 Commission on September 18, 2012, and the latter having been referred to the ABA Standing Committee on Ethics and Professional Responsibility on October 29, 2012.[230] However, the Task Force does believe that *inter firm* fee sharing may raise fewer concerns than its counterpart.

The need to maintain the independence of a lawyer's professional judgment is a concern in both the context of *intra firm* and *inter firm* fee sharing. However, in considering the Inter Firm Fee Sharing Proposal, members of the Task Force observed that *inter firm* fee sharing presents little, if any, risk, provided that certain safeguards are maintained in the rules. Specifically, in *inter firm* fee sharing, a lawyer is contracting with a completely independent law firm, responsible for complying with the ethics rules of its respective jurisdiction. Further, some members highlighted that the agreement is consensual and confirmed by the client in writing. Finally, some members observed that these arrangements have, in practice, existed for some time, and represent a practical solution to a practical issue.

Nevertheless, the Task Force considered whether Comment [9] was the appropriate means of condoning *intra firm* fee sharing arrangements. On the one hand, some viewed a Comment as an inappropriate means of overruling the provisions of a Rule, noting that Rule 5.4 explicitly prohibits the sharing of fees with a nonlawyer. It was observed that to the extent any such change to Rule 5.4 is being made, it ought to take the form of a rule, and not a comment. On the other hand, others viewed Comment [9] as a simple measure clarifying an existing Rule. Opinion 889 provides that a lawyer is not sharing fees directly with a nonlawyer when sharing fees with the **firm** itself. Task Force members expressed the view that there is a difference between sharing fees directly with a nonlawyer, and sharing fees with a **law firm** that has nonlawyer owners – the latter being *arguably* permissible under current ethical rules.

[230] *See* Fee Division Memorandum, *supra* note 93; *supra* note 103.

After deliberation, the Task Force reached a consensus that Comment [9] would best be served by adding an exception clause designed to protect clients and prohibit *inter firm* fee sharing where the lawyer's independent professional judgement is known to be at risk by virtue of a nonlawyer owner's influence. Specifically, with the addition of such language, Comment [9] would state as follows:

> A lawyer who is governed by the Rules of Professional Conduct in this jurisdiction is prohibited from allowing a nonlawyer to direct or regulate the lawyer's independent professional judgment. See Rule 5.4 (Professional Independence of a Lawyer). Subject to this prohibition, a lawyer in this jurisdiction may divide a fee with a lawyer from another firm in a jurisdiction that permits that firm to share legal fees with nonlawyers or to have nonlawyer owners, unless the lawyer who is governed by the Rules of Professional Conduct in this jurisdiction knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship, <u>or knows that a nonlawyer owner is directing or controlling the professional judgment of a lawyer working on the matter for which fees are being divided.</u> See Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).[231]

The Task Force reached a consensus that although the substance of this suggested revision to Comment [9] should be adopted by NYSBA, the appropriate implementation of the policy would best be carried out following further consideration by COSAC. By referring the implementation of the policy to COSAC, the Task Force expects COSAC's consideration to

[231] Suggested language has been underlined.

include whether the change is best accomplished through a modification to the Rules or through adoption of a Comment to the Rules. It should be noted that three members of the Task Force abstained from either supporting or opposing the Inter Firm Fee Sharing Proposal as revised or referring the issue to COSAC for further consideration.

B. *Recommendations*

At its meeting on June 7, 2012, the Task Force voted on: (1) whether New York should adopt any form of nonlawyer ownership (although the ABA NLO Proposal had been withdrawn) and (2) whether to support the ABA's Choice of Law Proposal. This Report was approved at a meeting of the Task Force on September 10, 2012.

On the issue of nonlawyer ownership, by a vote of 16-1, the Task Force opposed New York enacting any form of nonlawyer ownership at this time. When asked what conditions they would like to see before revisiting the issue of nonlawyer ownership, Task Force members primarily identified studies from jurisdictions where nonlawyer ownership is currently authorized. Members noted that they would want to see studies on the impact of nonlawyer ownership on access to justice, professionalism, lawyer independence, the relationship between the lawyer and the client, regulation of lawyers, and feedback from clients and "consumers" (as the UK refers to clients).

On the ABA Choice of Law Proposal, the Task Force unanimously opposed the proposal as written. By a vote of 9-5, the Task Force opposed any concept of *intra firm* sharing of fees with nonlawyer owners, even if subject to further restrictions.[232] By a vote of 9-6, the Task Force opposed any concept of *inter firm* sharing of fees, even if subject to further restrictions.[233]

[232] *Intra firm* sharing of profits with nonlawyer employees of the law firm is already permitted under Rule 5.4(a)(3) of the ABA Model Rules and New York Rule 5.4(a)(3), which provides that "a lawyer or law firm may compensate a nonlawyer employee…based in whole or in part on a profit sharing arrangement." *See* NYSBA Comm. on Prof'l Ethics, Op. 917 (2012) ("A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing

Subsequent to the Ethics 20/20 Commission's withdrawal of the *intra firm* fee sharing proposal and issuance of its revised proposal on *inter firm* fee sharing, the Task Force re-convened in October to discuss and vote on the Inter Firm Fee Sharing Proposal. By a vote of 14-5, the Task Force voted in favor of the Inter Firm Fee Sharing Proposal, provided that the language of Comment [9] is modified to explicitly restrict fee sharing where a lawyer knows that a nonlawyer owner is directing or controlling his or her professional judgment, as set forth in Section VIII.A.6 above. Further, on November 1, 2012, the Task Force reached a consensus in favor of referring to COSAC the implementation of the policy behind the modification to Comment [9], including whether the modification is best accomplished as a Rule or as a Comment to a Rule.

September 10, 2012

Amended October 10, 2012, November 1, 2012

based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients."); NYSBA Comm. on Prof'l Ethics, Op. 887 (2011) ("Rule 5.4(a)(3) clearly allows a lawyer to pay a bonus to a non-lawyer employee, including an employee engaged in marketing, that is not based on referrals of particular clients or matters, but rather is based on the profitability of the entire firm or a department within the firm"); NYSBA Comm. on Prof'l Ethics, Op. 733 (2000) (under former DR 3-102(A)(3), "a lawyer may compensate non-lawyer employees based on profit sharing but may not tie remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms").

[233] One Task Force member attending the June 7th meeting did not cast a vote concerning *intra firm* sharing of fees.

APPENDIX A

Speakers and Presentations at Task Force Meetings

A. *The Ethics 20/20 Commission*

The Task Force considered the viewpoints of several representatives from the Ethics 20/20 Commission including the Chair and individual members. Each expressed their support for the 20/20 Commission's proposal and elaborated on the basis for and requirements of the proposal with regard to alternative business structures for law firms.

At the January 25, 2012 NYSBA Annual Meeting, representatives from the Ethics 20/20 Commission led a panel discussion on the Ethics 20/20 Commission's recent ethics proposals, including the proposal on Alternative Law Practice ("ALP"). Chair Jamie S. Gorelick and Commission Member Frederic S. Ury spoke on the Commission's behalf.

Chair Gorelick expressed the view that the majority of the Commission then supported the ALP proposal, describing the proposal as "extremely modest." She explained that 10 years ago it was big firms that were seeking the benefit of MDP, but now she indicated that the push was coming from small firm lawyers.

Chair Gorelick also clarified that the ALP "proposal" was actually a discussion draft. In other words, the Commission was looking to the bar associations to provide data and real input to help answer two questions: (1) Is there a need or appetite for the proposal? (2) Is there a danger in adopting the change? At the time the discussion paper on ALP was issued, the Commission did not have any data or studies in its hands about the need for or impact of ALP structures, although Chair Gorelick indicated that they did look for such studies. She said that there had been no record of disciplinary complaints in D.C. stemming from nonlawyer ownership of law firms. She indicated that the evidence the Commission was able to amass

included testimony from a consultant to D.C. law firms, who gave the Commission anecdotal evidence that was supportive of the proposal. The Commission also went to the solo practice section of the D.C. bar, where half opined that they did not need ALP, and the other half said maybe. Chair Gorelick commented that the Commission saw the nonlawyer ownership movement in England as a success. She also explained that the Commission discussed the slippery slope issue and agreed that the legal profession should never jeopardize regulation by the courts and should not move toward national regulation of the legal profession.

At the Task Force's March 7, 2012 meeting, Phil Schaeffer, Liaison to the Ethics 20/20 Commission from the ABA's Standing Committee on Ethics and Professionalism spoke about the driving forces, benefits, and concerns behind the NLO discussion draft.

Schaeffer explained that in coming up with its proposal, the ABA was aware of a general sentiment against multidisciplinary practice ("MDP") and did not want to revive it. Instead, the ABA's proposal required that any outside investor support the legal practice itself. In crafting its proposal, the ABA looked to the only nonlawyer ownership prototype in the U.S. – the rule in the District of Columbia. For the last 20 years in D.C., lay people have been able to hold interests in law firms. The D.C. rule is broader than the Ethics 20/20 Commission proposal because in D.C. nonlawyers are able to provide services that are not limited to the legal practice. Schaeffer said that the ABA amassed quite a bit of testimony on the D.C. model, and the model has worked marvelously. Small firms as well as big firms have employed the new structure, and there have been no complaints. He also reported that the model has a broad range of applications, including land use and estate planning. The Ethics 20/20 Commission added more requirements than the D.C. model (e.g., requiring written certifications that outside participants are familiar with the Model Rules of Professional Responsibility and agree to abide by them,

making nonlawyers subordinate to lawyers, and requiring lawyers to maintain control over and responsibility for the practice). Schaeffer emphasized that the Ethics 20/20 Commission suggested a modest proposal requiring that nonlawyers work only in support of the legal practice; such as, for example, an investment advisor supporting estate services.

In response to questions from the Task Force, Schaeffer stated that regardless of whether firms can currently pay nonlawyers bonuses or contracts tied to firm profits, current rules do not allow for a long-term profit-sharing relationship. He elaborated that a lawyer just starting out may not be able to pay bonuses to employees, but could tie the firm's future success to compensation.

Concerning regulation and discipline of nonlawyers, Schaeffer expressed that the Ethics 20/20 Commission's proposal provides that if nonlawyers commit misconduct, their lawyer managers would be held responsible under the normal supervision rules and doctrines of respondeat superior. The only direct way to discipline a nonlawyer within the firm would be to sanction the nonlawyers by forcing them out of the firm. According to Schaeffer, the grievance committee is the last to receive news of misconduct. Schaeffer commented that the real regulation comes in the form of rising costs of malpractice insurance and premiums, and increased malpractice litigation. Further, while there would be no CLE requirements for nonlawyers under the 20/20 proposal, lawyers in the firm would be required to certify that the nonlawyer has read and is familiar with the Rules of Professional Responsibility.

Schaeffer explained that the impetus for the proposal was a desire to improve the quality of services provided to clients. He added that the Ethics 20/20 Commission perceived that the proposal would benefit young lawyers or lawyers of modest means who cannot afford to pay for expert services within their operations and cannot afford to pay a full salary; however, through

nonlawyer ownership, they could procure the desired expertise by offering long-term reward. He agreed with Chair Gorelick's earlier statement that the Ethics 20/20 Commission had no empirical evidence to support the proposal.

Schaeffer continued that the public is unaware of the legal profession's inability to finance litigation in general. Alternative litigation financing is another issue related to the proposal. He indicated that although clients pay for an expert, if the client cannot pay, the expert does not get paid. Having worked in land use law for many years, Schaeffer commented that many experts would have been happy if they were guaranteed a piece of the firm enterprise.

Schaeffer presented his own personal view that the Ethics 20/20 Commission's proposal did not go far enough, commenting that the proposal's 25% cap on nonlawyer ownership did not satisfactorily address the needs of solo practitioners just starting out. He believed the proposal should allow for full ownership, not an arbitrary 25% stake.

B. *United Kingdom*

At the Task Force's March 7, 2012 meeting, two speakers presented views regarding the United Kingdom's approach to ALP: Chris Kenny, Chief Executive of the UK Legal Services Board; and Anthony Davis, a partner at Hinshaw & Culbertson in New York. Each of the speakers described the movement leading up to the changes the UK made in how legal services are provided, allowing for full nonlawyer ownership, including passive outside investment. In addition, Davis and Kenny explained how legal services are regulated in the UK, and the perceived effectiveness of the system. Davis and Kenny expressed favorable views toward ALP and described the benefits it has provided to the UK.

Davis explained the genesis of the current regime in the UK. Ten years ago, during the Blair administration, a movement arose outside the legal profession to address perceived problems in the provision of legal services. The movement looked at the way solicitors were

disciplined and regulated, and concluded that the system was not working. Instead, a number of lawyers were committing fraud, and the system was harming clients and failing to address the needs of the public. Also around this time, the antitrust regulators in the British government began to look at restrictive trade practices within the legal profession, beyond just solicitors.

Out of this movement came a series of committees and reports, most notable being the Clementi Report, which led to the Legal Services Act of 2007. The Act provides for an over-arching non-governmental, national regulator of all groups that regulate the legal profession, known as the Legal Services Board. The largest group regulated by the Legal Services Board is solicitors, and the second largest is barristers. Davis explained that one of the "sub-regulators" is the Solicitor Regulatory Authority ("SRA"). The SRA is an independent agency and is not a self-regulating entity.

As Chief Executive of the Legal Services Board, Kenny's role is to regulate the regulators following eight overarching principles, which are laid out in the Act. Davis pointed out that the Legal Services Act is governed by the same objectives as the U.S. legal profession (e.g., service to clients, to the public, and professional independence). One critical difference is that the Legal Services Board and SRA also promote competition in the provision of legal services.

Kenny further explained that pressure from inside the UK around three issues combined to lead to this change. First, there was pressure from the UK competition authorities. A 2001 report concluded that law is no different from other businesses in that there should not be a barrier to ownership of law firms, because it would be unconscionable to allow such barriers anywhere else in the economy. Second, the profession was struggling to deal in a satisfactory way with complaints from consumers. Third, there was a collapse of confidence in self-

regulation of professions generally, including in other professions such as architects, as the country moved toward a more aggressive consumer culture. Kenny believes that nonlawyer ownership makes legal services much more accessible and less expensive.

Kenny also explained the workings of the Legal Services Act of 2007, describing it as complicated but absolute. The only two entities currently approved as legal licensing authorities are the SRA and the Council for Licensing and Conveyances (an authority of 1,000 people overseeing residential property work). The approval process is quite long and drawn out (it took 12 months in each case). The Act contains a specific test that imposes rules on regulators, and requires internal compliance structures and proper compensation arrangements.

Kenny informed the Task Force that there are 150 applications currently in the pipeline for NLO structures for law firms. He provided the following examples of structures: law firm partnerships consisting of IT directors and specialist lawyers, but not necessarily external investment; office staff receiving internal ownership rights in the company, which benefits firms in capturing the commitment of junior staff; small-to-large personal injury firms making initial public offerings (he commented that some people still feel uncomfortable with this example); private equity firms that are prepared to invest in law firms; family law firms; and in the communications business, a discrete personal injury work force of 120,000-130,000. Kenny indicated that he has seen a wide variety of practices within the last 2-3 months. Whether that level will be sustained and whether the front-line regulator approves them all remains to be seen. Kenny said the Board wants to make sure entry is possible, but also increase the professionalization of risk management in law firms at the same time.

In response to inquiries about the nature of investment structures, Kenny confirmed that investment structures have been tested to bring legal services to Main Street in the UK. For

example, there are plans to offer legal work in banking and food retailing. As one example, "Quality Solicitors" began three years ago, which helps brand and promote small firms.

Kenny explained the quality control and risk management measures the UK has put in place. Section 90 of the Act identifies three types of regulation: (1) proactively limiting the scope of the services; (2) regulating supervision of law firms; and (3) imposing penalties. Under the SRA model of quality control, the firm/entity is regulated as well as the individual (which was not the case before 2007). Before, partners were responsible only for those they supervised. Now, regulation is becoming a normal part of the legal market.

Davis described how the regulator regulates the entity as well as the individual in the UK. Each entity is required to have a chief compliance officer who is personally responsible for the provision of legal services by both lawyers and nonlawyers. Davis explained that management is also separately responsible and subject to discipline. The regulator can levy sanctions against the firm, but can also remove an owner from management or take away the owner's investment, and prevent a nonlawyer from owning a piece of the firm in the future as well. The regulator has the power to place conditions on licenses and ownership interests, and levy fines for noncompliance of up to £50 million.

Davis described three levels of safety that are built into the Act. First, there is a fitness-to-own test, through which criminal records of all potential owners are checked. Second, there is general regulation of the profession. SRA regulation provides a less detailed set of rules but sets forth what the lawyer is to achieve for the client. Third, there are enforcement measures like imposition of fines.

Kenny responded to questions concerning the Act's actual impact on the legal system in the UK. The Board reports annually on the impact of the Act on access to justice – one of the

specific objectives of the Board and regulators. There is an expectation that the UK will see improvement as to value and range of routine legal services that are provided, but Kenny expects to see a diminution in the number of small firms. Kenny sees consolidation as a sign that the market is serving the public better. Currently, eighty-five percent of firms in the UK have four partners or fewer, such as mom and pop solicitor shops.

Kenny believes that the Act has resulted in "consumer benefit." Such consumer benefit is seen in mass marketing in the personal injury market, and greater accessibility in language and terms of service, all of which enables legal services to be less daunting to the customer. Kenny gave an example of a one-stop shop that provides both law and accounting services.

When asked how the system affects professionalism, Kenny responded that the profession is self-aware, and that self-training ensures ethical conduct. At the same time, although nonlawyers are bound by the same ethical rules, there are no ethics training requirements for nonlawyers because, as Kenny described it, there is no reason for nonlawyers to make legal judgments, so those activities are only being carried out by people with the legal skills to do them.

C. *Australia*

On May 14, 2012, the Task Force Co-Chair and Secretary participated in a conference call with Steve Mark, the New South Wales Legal Services Commissioner, and Tahlia Gordon, the Research and Project Manager at the New South Wales Office of the Legal Services Commissioner. The call focused on learning about Australia's experience with alternative legal structures.

Mark explained that one of the biggest problems for organizations and law firms in America and England is the failure to understand what happened in Australia with regard to ALP. In his view, Australia did not go down the path of nonlawyer ownership at all. Rather, it

went down the path of reforming law firm structure and allowing law firms to incorporate, which incidentally allowed multi-disciplinary law firms. In contrast, the English allowed multi-disciplinary practices first and then followed the path of nonlawyer ownership, which Mark viewed as a fatal mistake.

As in the UK, Mark agreed that the push for change came from outside the profession. In 1999, due to federal government initiatives on competition policy, every jurisdiction in Australia was required to look at their legislation and determine whether there were barriers to competition. It was believed that all barriers should be removed unless the cost of removal was greater than the cost of retention. One of the results of this review was that Australia identified a barrier in the legal profession known as the "51% rule." Under that rule, if a firm allowed any nonlawyer to participate in the practice, the lawyers in the firm had to control at least 51% of everything because of the ethical duties lawyers owed to the court. That rule, which existed in Australia for 10-15 years, was found to be anti-competitive toward accountants who could not enter law partnerships and have a controlling interest. Mark said that after some debate, but without much feedback from the legal profession, the government simply allowed multi-disciplinary practice to exist unfettered.

Mark explained the shift from multi-disciplinary practice to incorporation of law firms in Australia came by way of new legislation. When multi-disciplinary practice was introduced unfettered, a concern arose that accounting firms would call themselves law firms and "all hell would break loose." That did not happen. At the time, multi-disciplinary practices were not regulated by corporate or legal regulators; legal regulators only regulated the conduct of individual lawyers, not entities. Mark commented that the existence of unregulated entities was one of the drivers behind the Australian government passing legislation called the Legal

Profession Act ("LPA"). By 2001, the government amended this legislation to allow law firms to incorporate, in order to bring them into a regulatory regime.

The LPA established the position of the solicitor director. The legislation requires any incorporated law practice to have at least one solicitor director, which Mark believes to be a key feature of the regulation. The solicitor director has the same duties as both a lawyer to the court, and as a director to the corporate regulator. Under the LPA, each solicitor director has to ensure that the law practice has appropriate management systems and is compliant with the LPA and the ethical duties of lawyers. As the regulator, Mark had to determine what an "appropriate management system" meant. To do so, he identified 10 points that firms must address (in contrast to what he referred to as a 300-page manual). Mark followed this route because he did not want to micromanage law firms by hiring 300 employees and evaluating the final management systems themselves. Rather, he wanted to force law firms to persuade him that they have a system that works. Mark only has a staff of 30, as compared to a staff of 1,200 for the legal regulator in the UK, whereas the size of the UK's legal profession is only four times the size of Australia's. According to Mark, the Australian system is not about heavy regulation. It favors principle regulation, as opposed to prescriptions.

As Mark expressed it, the Australian regulatory regime promotes professional ethics, values of professionalism which promote standards, profitability, standing in the profession, and competing on value (not commoditized services). The new system encourages a return to professionalism and away from commercialism, especially in small-to-medium size firms.

As an example of how this regulatory regime has worked, Mark pointed to Slater & Gordon, the first firm to go public in Australia. Before listing its shares, the firm met with Mark to show him the prospectus for the offering, and discuss promoting professionalism, the rule of

law, and client protection (given that his role is to reduce complaints related to these areas). Mark advised the firm to make serious changes to reflect that the firm would still be a law firm and not purely a corporation. Mark advised that, as a law firm, Slater & Gordon needed to make it clear that its primary duty is to the court, and not the corporate regulator. As a result, the firm revised its constitution and shareholder agreements to list a hierarchy of primary duties owed by its directors, in the following order of importance: (1) duty to the court, (2) duty to the client, and (3) duty to the shareholder. Mark informed us that Slater & Gordon recently acquired a UK firm, and used the same hierarchy of duties even though the UK does not require it. Slater & Gordon also added language informing investors that if there is a conflict between corporate law and the LPA, the LPA will prevail.

Mark noted that Slater & Gordon had a case against the tobacco industry. Shareholders of the firm wanted to drag the case out, so that they could earn more money through fees. However, the firm's clients were dying, so the law firm settled the case. Mark explained that shareholders cannot sue the firm the way they could as shareholders in a conventional corporation. As a result, he believes that the LPA structure helps return law firms to their roots as a profession and not just a business.

Mark emphasized that there is a difference between the UK and Australia regarding incorporation and external ownership. Referring to the pitfalls of the UK system, he noted that Sir David Clementi (who led the Clementi Report) was an accountant, not a lawyer. He missed the fundamental point of ensuring that the ethics of a law firm are maintained. Mark explained that the UK went about creating change in the wrong way, opening firms to external investors but not requiring a fit-and-proper test. Focus was placed more heavily on who the buyers were. Mark pointed out that the UK does not have a mechanism to require that the law firm remain a

law firm. Moreover, in Australia, if a solicitor director fails to ensure that the firm has an appropriate management system, Mark can step in and remove the solicitor director's practicing certificate, after which the firm will have seven days to find a new solicitor director or face involuntary liquidation.

As it concerns the impact of the LPA and law firm incorporation, Mark said complaints have dropped by two-thirds since law firms began incorporating. Mark and Gordon are looking at Slater & Gordon to examine the impact of the public listing on the firm's culture. They have talked to firm staff and administration, and have taken client surveys to get a sense of the internal climate at the firm. Their preliminary findings revealed no impact on the firm's ethical culture after listing publicly. Apparently, the concern is more about growth; the firm has grown so fast that employees do not know everyone in the firm anymore, and the firm is losing some of its collegiality. Mark informed us that, overall, the results have been wonderful because firm lawyers have been prompted to talk among themselves and figure out the best approach the firm should take. The result is a better-managed law firm, reduced complaints, better professionalism and ethics, higher profits, and less staff strain. Mark has received many "thank you" letters.

D. *District of Columbia*

At its meeting on April 24, 2012, the Task Force heard from representatives of the D.C. Bar; Carla Freudenburg, Regulation Counsel at the D.C. Bar; Hope Todd, the D.C. Bar's Legal Ethics Coordinator; Wallace E. Shipp, Jr., Bar Counsel, D.C. Office of Bar Counsel; and Lawrence Bloom, Senior Staff Attorney.

Todd provided the Task Force with background and the circumstances leading up to D.C.'s adoption of Rule 5.4(b). She explained that contrary to the common perception, D.C.'s NLO rule was not adopted because of pressure to allow nonlawyer lobbyists to join law firms. Rather, in the 1980s, when D.C. was considering adopting the ABA model rules, D.C. picked up

on two recommendations that the ABA rejected which aimed to provide better services to clients by loosening restrictions on sharing legal fees with nonlawyers. One of those proposals subsequently became Rule 5.4(b). Todd said the Rule is limited in scope because it allows individual nonlawyers to provide services only to an entity whose sole purpose is to provide legal services.[234] The Rule does not allow passive nonlawyer investment in firms, nor is D.C. interested in pursuing that concept. She expressed the view that the practice of law is enhanced by offering other services, while remaining subject to the Rules of Professional Conduct.

Todd explained that D.C. lawyers are made vicariously liable for breaches of ethics rules by nonlawyer members of their firms, an obligation which must be recognized in writing. There are no CLE requirements for nonlawyers, and D.C. does not even have CLE requirements for its lawyers. Shipp confirmed that in the 20 years of Rule 5.4(b)'s existence, there have been no disciplinary complaints related to nonlawyer owners. Since D.C. does not regulate firms in the same way as the UK, when asked how D.C. would respond to a complaint concerning a nonlawyer, Shipp conceded that this is a legitimate concern but he has not had to confront it.

Todd and others described D.C.'s practical use and experience with the Rule, noting that it has been hard to track. They informed the Ethics 20/20 Commission that D.C. has no empirical evidence on how the Rule is working. Todd explained that the Rule itself has not attracted wide usage because outside of D.C., a lawyer would risk violating another state's rules prohibiting nonlawyer ownership. Thus, unless a firm is solely based in D.C., lawyers have been, and will be, fearful to take advantage of D.C.'s Rule 5.4(b) until other jurisdictions change their rules. This limits the practical ability of sizeable D.C. firms having nonlawyer partners, and the result is that only small-size firms can take advantage of this structure (e.g., nurses in

[234] Shipp gave the following example of acceptable use of the Rule: a two-person law firm wants to bring in a social worker partner, both attorneys are licensed in D.C., and the social worker's function is related to the practice of law.

personal injury firms, and marketing directors). Although Todd was unable to give names because their ethics help line is confidential, she did disclose that the help line has received calls from firms purporting to have nonlawyer partners, asking how their role should be communicated to the public.

Shipp confirmed that use of the Rule is very limited. He indicated that the Rule's use may be limited because D.C. has a liberal admissions policy for out-of-state lawyers: 3,600 lawyers are admitted in D.C. each year, though only 125 sit for the D.C. bar. Thus, most lawyers will immediately have an ethics issue if they waive in from another jurisdiction and want to have a nonlawyer partner. The Ethics 20/20 Commission spoke with a D.C. lawyer who advises attorneys on setting up ALP structures. The lawyer said that although there is a lot of interest in the issue, most lawyers do not pursue it due to the licensing issues in other states. Instead, most firms set up ancillary services, pay good salaries to their nonlegal employees, or implement profit-sharing structures.

Todd and Shipp agreed that there is more interest from out-of-state firms wanting to take advantage of the D.C. model, as opposed to D.C. stand-alone firms. However, the D.C. bar's response has been to advise attorneys to be concerned about ethics issues in their primary jurisdiction of practice. At that point, most lawyers walk away. Shipp reported that of the roughly 1,000 phone inquiries he receives per year, only 10-20 are inquiries from lawyers who actually have nonlawyer partners in D.C. Shipp also indicated a willingness to allow a nonlawyer partner to be physically located outside the state, as long as the firm agreed to abide by D.C.'s ethics rules.

E. *David Udell*

The Task Force invited David Udell to speak at its meeting on April 25, 2012 about NLO's impact on access to justice issues. Udell is the Executive Director of the National Center

for Access to Justice at Cardozo Law School, and Chair of the Subcommittee on Access to Justice of the Committee on Professional Responsibility of the Association of the Bar of the City of New York. While Udell emphasized the need for improved access to justice, he noted that it is undetermined how NLO would enhance that goal.

At the outset, Udell noted that access to justice has become an increasingly serious problem. Because of the economy, many more people are unrepresented. Court budgets have been slashed, the legal services groups' budgets have been slashed, less interest is available to fund IOLTA accounts, and legal fees are rising in the private market, which is pricing the middle class out of the legal system. Legal education is also being attacked as irrelevant, failing to teach practical skills, and leaving high numbers of graduates underemployed.

Udell noted that Chief Judge Lippman has been holding a third year of hearings on the state of access to justice in New York as part of a Task Force headed by Helaine Barnett.[235] He explained that the Task Force has collected data on the numbers of unrepresented New Yorkers, finding that only 10% of tenants have legal representation in Housing Court matters, and close to 0% are represented in debt collection and foreclosure proceedings.[236] There have been concerted efforts to use the court's budget to obtain more funding for legal services.

Udell pointed out that the New York City Bar Committee on Professional Responsibility is taking a fresh look at nonlawyer ownership models of practice and unauthorized practice laws. Udell noted that alternative business structures have always been an issue when considering improvements to access to justice. Although Udell indicated that the Committee on Professional Responsibility has not yet completed its work, he thinks the profession is subject to sharp

[235] *See, e.g.*, The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York (Nov. 2011), *available at* https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf.
[236] *See, e.g., id*. at 16.

criticism because it has prevented other models of representation, while in several areas of law lawyers have not been available to provide any representation to the poor and middle class. Nonetheless, Udell believes it is comparing apples to oranges to say that lawyering is advances by allowing nonlawyer ownership. Udell stated that there is a market opportunity for nonlawyers to provide services at lower costs than what lawyers charge, but that issue is beyond the scope of his Committee. Alternative business structures are not his Committee's main focus, but rather they are looking at the need for greater access to justice and how to meet that need.

Udell and Task Force members discussed instances where nonlawyers currently provide services that are akin to legal services. For example, in social security disability litigation, nonlawyers provide assistance to clients in disability appeals. Securities arbitration is not considered the practice of law either. In foreclosure proceedings, parties are often pushed into debt modification and use the services of financial advisors. Nonlawyers also participate in providing services in unemployment insurance, workers compensation, NLRB cases, and tax assessments. Udell pointed out the "friend" model, where an unrepresented person can bring a nonlawyer to court to provide moral support and speak to the judge on their behalf, but there is less regulation of what the nonlawyer can do in that situation. The concept was controversial when it was being considered in the UK, but reports indicate that judges appreciate this role.

Udell closed by stating that there is a population for whom a small payment is hard to make in order to pay for legal services so there is a powerful argument that companies like Walmart, if they could own legal service providers, could do so at lower costs than are currently charged. He noted that this model is currently being played out in the UK.

F. *Gary Munneke*

On April 25, 2012, the Task Force heard from Gary Munneke, a Professor at Pace Law School, who is Chair of the ABA's Law Practice Management Section Task Force on the

Evolving Business Model for Law Firms and Chair of the New York State Bar Association's Committee on Law Practice Management.

Since the time when Rule 5.4 was first introduced during the 1990s, Munneke has studied the subject of alternative business structures. He expressed the view that the Ethics 20/20 Commission's discussion paper was correctly withdrawn, as the issue is multi-faceted and complex, and it was not adequately addressed in the paper. He indicated that the issue has deep roots in the American system of law, noting that the first draft of the Model Rules would have provided that a lawyer cannot allow a nonlawyer to influence the lawyer's perspective. Munneke recalled that in debating the Model Rules, delegates to the ABA House from Oklahoma asked whether Sears would be able to own a law firm. They amended the rules to add a prohibition on fee sharing with nonlawyers and passive investment in law firms.

Munneke explained that the discussion on alternative law structures raises several issues that deserve different attention: (1) nonlawyer investment in firms; (2) nonlawyer ownership of firms; (3) influence on a lawyer's independent professional judgment; (4) fee sharing with nonlawyers; and (5) multidisciplinary practice (which he referred to as combined services).

Addressing the issue of nonlawyer investment, Munneke expressed there is a need to capitalize law firms so they can compete on a global stage. This is seen in the efforts of UK firms to be dominant world players in the legal services sector. We need to consider the financing of law firms if New York firms are to compete globally. Access to capital helps firms compete in the world market. The Report of the New York State Bar's Task Force on the Future of the Legal Profession notes that large firm economics will continue to change.[237]

[237] *See* NYSBA Report of the Task Force on the Future of the Legal Profession (Apr. 2, 2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108.

Turning to the issue of nonlawyer ownership, Munneke indicated that he is less troubled by passive investment in law firms than direct ownership. There are a number of situations where we already have forms of nonlawyer "control" over firms: corporate counsel's office, general counsel who work for the CEO of a company, group legal services, groups like the NAACP Legal Defense Fund (which are dominated by boards of directors which include nonlawyers), law firms that are dominated by a single client, large firms that delegate major decisions to nonlawyer administrators, lawyers employed by nonlegal organizations (e.g., Big Four accounting firms), and fee sharing by the beneficiary of a law firm retirement plan. Passive investment is more dangerous. Lawyers can capitalize their firms through loans, but lending terms are so strict that banks end up influencing how firms run their businesses. He cited Dewey LeBoeuf as an example.

Munneke would distinguish multi-disciplinary practice from investment/ownership issues. There are already teams of lawyers that work with nonlawyers. In particular, because the current rules allow law firms to have ancillary businesses, nonlawyer ownership exists to the extent ancillary businesses can be owned by a nonlawyer. New York recognized this reality and tried to establish rules to ensure clients were advised of these arrangements. But sometimes ancillary services are indistinguishable from traditional law firm services.

Munneke said that before any new ABA proposal on alternative law practice surfaces, he would like to study situations where nonlawyers are in a position of influence so he could begin to piece together what protections are needed to preserve the lawyer-client relationship and articulate those protections as standards. In 1969, when the Code of Professional Responsibility was adopted, a few lines were devoted to the issue. In 1983, when the Model Rules were adopted, a few pages addressed the issue (particularly conflicts), and New York allowed law firm

affiliations in Rules 5.7 and 5.8. Munneke indicated that we are moving in the right direction with lawyer regulation. In essence, we should look at what has already happened and ask how we can protect the attorney-client privilege and preserve our core values now.

Munneke said there may be certain unwaivable conflicts that impact nonlawyer ownership, but that concern has not been thought out yet. He thought we might be able to draft rules to cover situations that do not present unwaivable conflicts.

Regarding the ABA's choice of law proposal, Munneke recognized that New York should want British law offices to be able to transact business here. He acknowledged that Opinion 911 is more advisory. To make sure choice of law rules are not abused, Munneke suggested that a restructuring be considered so that affiliated law firms can work around the current rules.

G. *Paul Saunders*

At its April 25, 2012 meeting, the Task Force heard from Paul Saunders, Chair of the NYS Judicial Institute on Professionalism created by former Chief Judge Judith S. Kaye to review issues related to lawyer independence. He expressed concern that nonlawyer ownership will negatively impact the professional independence of lawyers.

Saunders began by explaining the workings of the Institute. The Institute consists of 20 members all appointed by the Chief Judge. For the last 15 years, the Institute has had a broad mandate to examine issues of lawyer professionalism, and bring together representatives of the legal profession, judiciary, and academy for dialogue about the profession. The Institute is supported by the Office of Court Administration, but is independent and sets it own agenda. Saunders informed us that Lou Craco's Committee on the Profession and the Courts preceded the Institute.

Saunders informed the Task Force that for the last two-and-a-half years, the Institute has been examining lawyer independence. He noted that the Craco Committee emphasized that lawyer independence is one of the single most important hallmarks of the legal profession. The Institute decided to study this issue from several perspectives. In the Fall of 2009, it began holding convocations to examine the question, and will eventually publish the results and proceedings. The Institute held its first convocation at Fordham Law School on the subjects of lawyer independence, big firm practice, and the role of law firm general counsel. The second was held in Albany and focused on lawyer independence for government lawyers. They discussed how lawyers representing small government entities, such as town or school boards, must render their legal advice in public, and the difficulties involved in trying to give legal advice to an elected official. The Institute held a third convocation at Hofstra Law School on small firm practice and solo practitioners. The fourth convocation will be held this Fall at the Judicial Institute at Pace. The convocation will focus on in-house corporate counsel and will feature IBM's general counsel, Bob Weber.

Saunders said that the Institute has not taken a formal position on nonlawyer ownership but he shared his thoughts on the issue. Rule 2.1 of the New York Rules and the ABA Model Rules requires lawyers to exercise independent professional judgment and render candid advice when representing a client. Unlike the ABA Model Rules, under New York's Rule, a violation of this rule is not enforceable by disciplinary proceedings. Still, he indicated that independence is essential to our profession as distinguished from other professions.

Saunders expanded on the policy behind Rule 2.1 and whom it protects. Most think the Rule protects clients so that they will not break the law. Saunders said that Professor Michaels has studied this Rule and concluded that the real purpose is not to protect clients, because many

other rules do that; rather, the purpose is to protect third parties and society. Craco's keynote address at the Institute's last convocation elucidated this concept. Lawyers need independence in two senses: one sense of independence is our collective autonomy from supervision by others; the other is our ability to give disinterested advice to clients. We are an independent autonomous profession only because we are called on to give our best disinterested advice free from exterior pressures. In this respect, we are actually performing a service to the public; we are delivering the rule of law.

Saunders continued that nonlawyer ownership is related to independence in three ways. First, ours is a noble profession because we are autonomous, we govern our own professional conduct, and we have a set of rules that we subscribe to. Few other professions can say that. Nonlawyers are not required to be independent. As a result, nonlawyer ownership might threaten the autonomy of the profession that is essential to its continued existence.

Second, nonlawyer ownership may threaten our collective ability to give candid, totally dispassionate legal advice. In Europe, there is no lawyer-client privilege for in-house counsel, because in-house counsel are not independent. In-house counsel in Europe cannot give independent legal advice to their boss/owner because their job, salary, or a promotion may depend on it. Saunders said that the same argument might be made concerning nonlawyer ownership of a law firm because other forces affect one's independence as a lawyer.

Third, there is the argument that nonlawyer ownership "threatens" public notions that the law is a noble profession. Public perception is very important to our profession and to our continued autonomy. According to Saunders, that is not to say that law is not a business. Rather, he believes that we do not need any more signs suggesting the "business" aspect of the law to the public. What we need are more signs that the practice of law is a profession, a noble

profession. The Institute is dedicated to the preservation of professionalism and our collective calling.

When asked whether there are any alternative law firm structures that would not raise independence concerns, Saunders responded that the farther away the nonlawyer is from having anything to do with the practice of law, the better.

As to access to justice, Saunders replied that nonlawyer ownership may increase availability of services to people who are unable to afford a lawyer. However, he did not think we needed nonlawyer ownership to achieve this. Our problem is a collective unwillingness to make legal services more affordable.

Saunders said that although lawyers are regulated by the courts, we are still autonomous. At the margins, the rules are enforced by a disciplinary board, but usually discipline is achieved by lawyers understanding the rules and governing themselves.

Saunders opined that the need for law firm capital and resources does not alleviate independence concerns. Non-equity ownership and commoditization of legal advice diminish the perception of our profession. We need the public to understand that we are a profession, not a drug store. Saunders believes that attorney advertising has diminished our profession and that we are approaching a slippery slope by addressing the possibility of nonlawyer ownership.

APPENDIX B

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ARTICLES

When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism

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ABSTRACT

As legal aid budgets have stagnated or declined, deregulatory approaches to address the access gap in civil legal services have gained traction in the United States. One proposed deregulatory strategy, non-lawyer ownership of legal services, has become both particularly prominent and contested. Competition advocates claim that allowing non-lawyers to own legal services will bring in needed capital and expertise that will make legal services more affordable and reliable, while many members of the bar contend these outsiders will undercut professionalism. The existing academic literature has been almost entirely speculative and largely favored non-lawyer ownership on theoretical grounds.

Non-lawyer ownership though is not an abstraction. Two major jurisdictions, the United Kingdom and Australia, have adopted such ownership in recent years, and there are parallels to it within the United States in online legal services and social security disability representation. This Article draws on case studies and quantitative data from these three countries to argue for a more context-driven understanding of the impact of non-lawyer ownership. It finds that, for reasons under-explored in the literature, the access benefits of non-lawyer ownership are generally oversold, potentially diverting attention from more promising access strategies. This Article also identifies challenges to professionalism that non-lawyer ownership can create, including new types of conflicts of interest and the potential for regulatory capture by new actors who can profit from legal services.

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* Research fellow at the Program on the Legal Profession, Harvard Law School. I would like to thank David Wilkins, Amy Chua, Jed Rubenfeld, Robert A. Kagan, Vic Khanna, Mark Wu, Carole Silver, Marc Galanter, Scott Cummings, Robert Gordon, Cass Sunstein, John Flood, David Grewal, Drew Days III, Dennis Curtis, Ian Ayres, Dave Trubek, Laurel Terry, Vince Morabito, Stephen Mark, Tahlia Gordon, Henry Hansmann, Richard Abel, John Morley, Susan Rose-Ackerman, Avrom Sherr, John Fabian Witt, Issa Kohler-Hausmann, William Alford, Intisar Rabb, Daniel Nagin, and James Greiner for their discussions about and valuable feedback on this Article. The Article also benefited from feedback at presentations at Harvard Law School, Yale Law School, UC Davis, and the Law and Society Annual Conference in Minneapolis.

Despite its questionable access benefits, given current trends towards deregulation, non-lawyer ownership is likely to continue to spread. To address the potential dangers it can create, as well as maximize any access benefits it can bring, this Article recommends a process-based solution. Namely, that a diverse set of stakeholders, drawing on available empirical data, develop a tailored approach for when to allow for non-lawyer ownership and in what form.

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INTRODUCTION

In the face of stagnant or declining legal aid budgets[1] and perceived limitations of pro bono assistance,[2] deregulatory approaches to address the access gap in civil legal services have gained traction in the United States. These include proposals to liberalize restrictions around the unauthorized practice of law,[3] as

1. Funding to the Legal Services Corporation, which helps fund civil legal aid programs in U.S. states, has declined by almost half in real terms between 1994 and 2013 to $340 million. *Funding History*, LEGAL SERVICES CORPORATION, http://www.lsc.gov/congress/funding/funding-history [http://perma.cc/E4CU-M27P] (last visited Aug. 29, 2015); DEBORAH L. RHODE, ACCESS TO JUSTICE 186 (2004) (noting that most programs to assist the poor in both "civil and criminal matters are starved for resources").

2. For an overview of some of these constraints, see Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 115–144 (2004) (detailing the history of the institutionalization of pro bono in the United States and noting the limitations of having free legal services provided by lawyers beholden to private commercial interests).

3. *See, e.g.*, RHODE, *supra* note 1, at 87–91 (advocating for allowing other professionals, like accountants, to practice law in some areas and licensing and certifying others to perform other legal activities); Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STANFORD L. REV. 1689, 1709–11 (2008) (arguing that non-lawyer providers could

well as to create new categories of legal providers, like licensed paralegals, that require fewer qualifications.[4] Perhaps the most prominent and controversial deregulatory approach is to allow for non-lawyer ownership of legal services. Liberalization advocates contend that the outside capital and expertise non-lawyers would bring would increase access to justice by making legal services more affordable and reliable. This argument has been taken up by civil society,[5] numerous legal academics,[6] and is a key claim in a legal challenge to restrictions on non-lawyer ownership brought by the law firm of Jacoby & Meyers in a New York federal court.[7] On the other hand, opponents of non-lawyer ownership, including the American Bar Association (ABA), assert that opening up the profession to outside owners will undercut lawyers' independence and professionalism with adverse consequences to all clients, including those in under-served populations.[8]

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adequately provide many legal services); CLIFFORD WINSTON, ROBERT W. GRANDALL, & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 83 (2011) (arguing for a certification regime instead of a licensing regime for most legal services in the United States).

4. Notably, in 2012 Washington State introduced licensed "legal technicians" in an effort to increase access to civil legal services. For an overview of this policy and the history leading up to it, see Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 77 (2013); *see also* RHODE, *supra* note 1, at 15 (noting that "almost all of the scholarly experts and commissions" that have studied the issue have recommended a larger role for non-lawyer specialists).

5. TESTIMONY TO THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL AID SERVICES ON ALLOWING INNOVATION TO MEET UNMET LEGAL NEEDS, RESPONSIVE L. (Sept. 27, 2013), http://responsivelaw.org/files/Responsive_Law_-_NY_Task_Force_2013.pdf [http://perma.cc/8LBP-G5V2] (arguing that non-lawyer ownership would increase access to legal services).

6. For an early example of the argument that non-lawyer ownership will increase access, albeit by two Canadians, see Robert G. Evans and Alan D. Wolfson, *Cui Bono-Who Benefits from Improved Access to Legal Services*, *in* LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES 3, 24–26 (Robert G. Evans & Michael J. Trebilcock eds., 1982). In the run-up to the consideration of multi-disciplinary practice by the American Bar Association several prominent academics wrote in support of non-lawyer ownership, although mostly on efficiency, not access grounds. *See, e.g.*, Larry Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1721–25 (1998); Edward Adams & John Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998). More recently, a number of articles have appeared arguing for non-lawyer ownership on access grounds. *See, e.g.*, Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L. J. 1 (2012) (arguing for non-lawyer ownership on first amendment and access grounds); Gillian Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2013) (arguing that abandoning restrictions on the corporate practice of law in the U.S. can significantly increase access to justice); Cassandra Burke Robertson, *Private Ordering in the Market for Legal Services*, 94 BOSTON UNIV. L. REV. 179–180 (2014) (arguing that restrictions on non-lawyer ownership reduce access and should be struck down as unconstitutional).

7. *See infra* note 203.

8. *See infra* II.C.; The New York State Bar Association (NYSBA) has considered and rejected non-lawyer ownership twice. *See* N.Y. ST. BAR. ASS'N SPECIAL COMM. ON THE L. GOVERNING FIRM STRUCTURE OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, Ch. 12, § 5 (2000) (describing how outside investment could undercut lawyers' independence); N.Y. ST. BAR ASS'N, REPORT OF THE TASKFORCE ON NONLAWYER OWNERSHIP 73–76 (2012) [hereinafter NYSBA REPORT] (citing amongst other concerns that non-lawyer ownership might undercut professionalism).

Although the debate between these two competing sides has often been fierce, it has also been almost entirely theoretical with the New York State Bar Association Taskforce on Non-Lawyer Ownership recently noting, "there simply is a lack of meaningful empirical data about non-lawyer ownership . . ." (partly because of this dearth of data, the Taskforce recommended not allowing outside owners).[9] Non-lawyer ownership though is not an abstraction. It has been allowed in most Australian states since the early 2000s[10] and in England and Wales in the United Kingdom since 2011.[11] Since making these regulatory changes, these two countries have seen new types of actors provide legal services, including law firms that are listed on stock exchanges,[12] law firms owned by major insurance companies,[13] and legal services offered by brands better known for their grocery stores.[14] Under pressure from Australian and British law firms, Singapore recently allowed for minority non-lawyer ownership[15] and the United Kingdom's membership in the European Union may eventually force other European countries to also open up their legal markets.[16]

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9. *Id*. at 17. The report continued, " . . . we are not aware of any empirical studies of any established forms of nonlawyer ownership in other jurisdictions. This created a material limitation on the Task Force's ability to study the issue as it was difficult to assess past experience." *Id.* at 72.

10. Starting with New South Wales different states in Australia allowed for non-lawyer ownership beginning in 2001. *See* Christine Parker, *Peering Over the Ethical Precipice: Incorporation, Listing and the Ethical Responsibilities of Law Firms*, U. MELBOURNE LEGAL STUD. RES. PAPER No. 339, at 5-6 (2008).

11. *Alternative Business Structures*, L. SOC'Y (Jul. 22, 2013), http://www.lawsociety.org.uk/advice/practice-notes/alternative-business-structures/ [http://perma.cc/FN2C-G8JG] (noting that alternative business structures, or "ABSs," began to be approved in 2011) [hereinafter *Alternative Business Structures*].

12. In 2007, the Australian law firm Slater & Gordon made headlines by becoming the first publicly traded law firm in history. Peter Lattman, *Slater & Gordon: The World's First Publicly Traded Law Firm*, WALL STREET J. L. BLOG (May 22, 2007), http://blogs.wsj.com/law/2007/05/22/slater-gordon-the-worlds-first-publicly-traded-law-firm/ [http://perma.cc/3Q2L-X8CR].

13. *See infra* II.A.1.

14. *See infra* II.A.2. for a description of Co-operative Legal Services, which is part of the Co-operative Group that runs a popular grocery store chain in the UK.

15. John Hyde, *Singapore Embraces ABSs to 'Keep Pace' With Rivals*, L. SOC'Y GAZETTE (Jan. 28, 2014), http://www.lawgazette.co.uk/5039611.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ280114 [http://perma.cc/D52M-YMVQ]; COMMITTEE TO REVIEW THE REGULATORY FRAMEWORK OF THE SINGAPORE LEGAL SERVICES SECTOR, FINAL REPORT 6, 38 (2014), https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20Report%20of%20the%20Committee%20to%20Review%20the%20Reg%20Framework%20of%20the%20Spore%20Legal%20Sector.pdf [https://perma.cc/3DWM-GDK8] (finding that the new ABS models in Australia and the UK had caused 'pressure' on Singapore's regulatory structure, with firms from those jurisdictions seeking to register in a similar form to their head offices).

16. Jacob Weberstaedt, *English Alternative Business Structures and the European Single Market*, 21 INT'L J. LEGAL PROF. 103, 109 (2014) (arguing that UK membership in the European Union will lead the entire union to adopt similar rules relating to non-lawyer ownership); Spain, Italy, and Denmark already allow for minority non-lawyer ownership. PANTEIA, EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS: FINAL REPORT 205-06 (2012), http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf [http://perma.cc/23MY-4TQH] (listing European countries that allow for partial non-lawyer ownership).

Meanwhile, regulatory bodies not just in the United States,[17] but also Canada[18] and Hong Kong[19] are actively considering whether to allow for non-lawyer ownership in legal services.

This Article helps fill the current knowledge gap facing regulators by undertaking the most extensive empirical investigation of the impact of non-lawyer ownership to date. It focuses in particular on non-lawyer ownership's effect on civil legal services for poor and moderate-income populations. To do this, it draws on qualitative case studies and other available empirical data from the United Kingdom and Australia, as well as the United States, where non-lawyer ownership is generally barred, but close parallels are present in online legal services and social security disability representation.

Part I begins by briefly describing how non-lawyer ownership functions in the United Kingdom and Australia. It then lays out the most common justifications of those who claim non-lawyer ownership of legal services will either increase access or undercut professionalism. It then argues that those on both sides of this debate have mischaracterized its probable impact in at least three ways. First, their claims are frequently overly abstract. Not only do they not ground their claims empirically, but they generally ignore how the impact of non-lawyer ownership will likely be affected by contextual factors, specifically the type of non-lawyer owners, the legal sector at issue, and regulatory and economic variations between jurisdictions. Second, although non-lawyer ownership has spurred new business models as predicted by its advocates, it is unlikely these innovations will significantly increase access in most legal sectors for reasons that are underexplored in the literature. Finally, while non-lawyer ownership probably will not lead to the nightmare scenarios that some suggest,[20] in some contexts it can create new conflicts of interest and undermine lawyers' public

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17. NYSBA REPORT, *supra* note 8, at 2 (recommending that New York not adopt non-lawyer ownership absent compelling need, pressure to change, or empirical data); James Podgers, *ABA Ethics Opinion Sparks Renewed Debate Over Nonlawyer Ownership of Law firms*, ABA JOURNAL (Dec. 1, 2013, 9:30 AM), http://www.abajournal.com/magazine/article/aba_ethics_opinion_sparks_renewed_debate_over_nonlawyer_ownership_of_law_fi/ [http://perma.cc/4ZFN-WZEB] (describing debate created when the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that would permit a law firm to split fees with a law firm from another jurisdiction that is non-lawyer owned); Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest in Law Firms*, FORBES (Mar. 11, 2011 8:22 AM), http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/ [http://perma.cc/3REW-3Y6J] (describing legislation introduced in North Carolina that would have allowed non-lawyers to buy up to forty-nine percent of a law firm).

18. CBA LEGAL FUTURES INITIATIVE, FUTURES: TRANSFORMING THE DELIVERY OF LEGAL SERVICES IN CANADA 68 (2014), cbafutures.org/CBA/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf?ext=.pdf [http://perma.cc/4M4R-WBX9] (recommending the Canadian Bar Association allow for Alternative Business Structures).

19. Kathleen Hall, *Hong Kong Ponders ABS Model*, L. SOC'Y GAZETTE (Sept. 13, 2013), http://www.lawgazette.co.uk/practice/hong-kong-ponders-abs-model/5037620.article http://perma.cc/J5PU-RR5W].

20. The idea of non-lawyer ownership has inspired actual nightmares for some.

> Along the way to this presentation I also had nightmares. It was five years from now, the ABA was in steep decline . . . after an exhaustive search [of the ABA meeting] no programs on pro bono were to be

spiritedness and professional standards, often in ways even critics have failed to appreciate.

Part II illustrates these arguments through available data and case studies of non-lawyer ownership in the United Kingdom, Australia, and the United States. Part III uses these country studies to support and expand the arguments about non-lawyer ownership's likely impact laid out in Part I. Part IV ends by exploring some of the access and regulatory implications of the Article. Given the questionable impact of non-lawyer ownership on access, it argues that deregulatory approaches like non-lawyer ownership can become a distraction and that other strategies to increase access should instead be prioritized, particularly strengthening and broadening legal aid. Even though non-lawyer ownership may not bring significant access benefits, given current liberalization trends, such ownership is likely to continue to spread. To address concerns about professionalism non-lawyer ownership can create as well as to maximize any access benefits it can bring, the Article recommends a multi-stake holder process to tailor when and how to allow non-lawyer ownership, weighing its costs and benefits in different contexts.

While the regulation of the legal profession has often benefited lawyers more than the public,[21] there is a danger that a new regulatory regime that embraces an ideology of deregulation or competition too strongly will gloss over new hazards or unduly dismiss old values worth supporting. Reforms like non-lawyer ownership raise the possibility for new conflicts between the interests of clients and the potentially diverse and distinct interests of non-lawyer owned commercial enterprises. With new groups profiting from legal services, regulation may become less susceptible to capture by interests inside the legal profession, but more susceptible to capture by actors outside of it. More generally, by becoming more like other services in the market the profession risks losing the public spiritedness that draws socially committed individuals into its ranks and supports its ability to promote public-spirited ideals within the legal system and more broadly.[22] These concerns should not lead to a dismissal of non-lawyer

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> found, the crisis in death penalty representation went unnoticed . . . and no one was worrying about the independence of the judiciary . . .

LAWRENCE FOX, WRITTEN REMARKS OF LAWRENCE J. FOX TO THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE (Feb. 1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/fox1.html [http://perma.cc/6M4L-ECUJ].

21. For perhaps the most extensive critique of lawyer self-regulation in the United States, see RICHARD ABEL, AM. LAW (1991).

22. *See* Robert Gordon, *The Independence of Lawyers*, 68 B. U. L. REV. 1, 9, 32 (1988) (arguing that many are attracted to the profession for its independent, collegial, and intellectually stimulating environment or its publicly minded goals); David Wilkins, *Partner Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1273–77 (2007) (detailing the "paradox of professional distinctiveness," which is that as law firms attempt to model themselves more on other types of businesses to increase efficiency that they lose their professional uniqueness which both justified the profession's self-regulation and attracted talented practitioners to firms in the first place).

ownership out of hand, but instead a continuing analysis of available evidence to assess arguments over the merits of different types of non-lawyer ownership in different contexts.

I. NON-LAWYER OWNERSHIP OF LEGAL SERVICES

A. UNBUNDLING OWNERSHIP OF LEGAL SERVICES

Like any enterprise, the ownership of a legal services entity can be viewed as a bundle of rights and duties. These rights and duties may be unbundled and apportioned to different owners. For example, one party may claim profits produced by a business enterprise, while the right to manage that enterprise may be claimed by another. In practice, if one has significant profit rights in a business one will generally desire a stake in how it is controlled, but the two types of rights can be unbundled, such as in the case of non-voting stock in a public company.[23]

A commercial enterprise delivering legal services has an added element of complexity surrounding its ownership. Only lawyers are allowed to practice law, so an enterprise offering legal services must do so through lawyers. Lawyers, though, do not have an unlimited right in the legal services they sell.[24] Instead, like other licensed occupations, they have a conditional use right given by the state, usually through one or more regulators. These regulators not only determine the conditions required to become a lawyer, but also can withdraw a lawyer's right to practice if they violate certain professional rules, such as lying to a court or misappropriating a client's funds.[25]

Significantly, regulators of legal services have traditionally limited the ability of lawyers to be part of a commercial enterprise in which non-lawyers share profits in or manage the business entity.[26] These restrictions have largely been justified on the premise that non-lawyers may inappropriately influence how legal services are offered either to increase profits or out of a lack of appreciation of the duties imposed on one offering legal services.[27]

The recent reforms in the United Kingdom[28] and Australia[29] have relaxed or ended these restrictions on lawyers' commercial relationships with non-lawyers and so open up new potential ownership structures for legal services. For

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23. HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 12 (2000) (noting that if those with control rights have no rights to residual earnings they will have little incentive to make a profit).

24. *See*, *e.g.*, MODEL RULES OF PROF'L CONDUCT (2009) [hereinafter MODEL RULES] (listing rules that lawyers must follow in order not to be disciplined or disbarred).

25. *See*, *e.g.*, MODEL RULES R. 8.5 (2009) (empowering disciplinary authorities to sanction lawyers).

26. *See*, *e.g.*, MODEL RULES R. 5.4 (2009) (declaring that a lawyer shall not share legal fees with a non-lawyer or practice law in an organization where a non-lawyer owns or is the director of or can control the professional judgment of a lawyer).

27. *See infra*, I.B.

28. *See* Legal Services Act 2007, c. 29 (U.K.); *Alternative Business Structures*, *supra* note 11.

29. *See* Parker, *supra* note 10.

example, in both countries non-lawyers can now join law firms as partners, law firms may become publicly owned, or legal services may be offered alongside other non-legal services or products offered by a larger commercial enterprise.[30] While lawyers could previously only sell their law firm to other lawyers, who would then themselves have to become part of the firm, lawyers in this more liberalized environment can sell their firm, or part of it, to lawyers or non-lawyers whether they are active managers or passive investors.[31]

TABLE 1:
POTENTIAL RIGHTS AND DUTIES OF DIFFERENT TYPES OF OWNERS AND EMPLOYEES IN AN ENTITY SELLING LEGAL SERVICES.

	Sharing Profits	Control of Business	Transfer Rights	General Liability	Control of Legal Services	Professional Liability
Lawyer Owners	X	X	X	X	X	X
Non-Lawyer Owners	X	X	X	X		
Lawyer Employees					X	X

Governments and regulators in jurisdictions where they have allowed non-lawyer ownership have been clear that control over the right to actually practice law has to remain with licensed legal professionals, even if the profit rights of the business can be shared more broadly. To accomplish this, jurisdictions adopting non-lawyer ownership have required that a lawyer be responsible for ensuring professional rules of conduct are abided by in legal service enterprises owned by non-lawyers. England and Wales have mandated compliance officers for legal practice,[32] while in jurisdictions like New South Wales in Australia a legal practitioner director performs a similar role.[33] If the business enterprise, or those in it, violate rules of professional conduct these compliance lawyers have a duty to correct the misbehavior, and the business entity may be disciplined or barred from offering legal services in the future if it is not corrected.[34] In Queensland,

30. *See infra* II.A–B.

31. *Id.*

32. SOLICITORS REGULATION AUTHORITY, SRA AUTHORISATION RULES FOR LEGAL SERVICES BODIES AND LICENSABLE BODIES 2011, Rule 8.5 [hereinafter SRA AUTHORISATION RULES].

33. Legal Services Commission, OBLIGATIONS OF LPDS (Nov. 2013), http://www.lsc.qld.gov.au/compliance/incorporated-legal-practices/obligations-of-legal-practitioner-directors [perma.cc/G87J-FBX5].

34. *See* SRA AUTHORISATION RULES, *supra* note 32, at R. 8.5 (finding compliance officers must take all reasonable steps to ensure compliance and report any failures); *Legal Profession Act 2004* (NSW) s 141(2)

the legal practitioner director also manages the entity's legal services,[35] while in England and Wales one of the managers of the enterprise offering legal services must be a lawyer.[36] Further, all lawyers working in any entity must abide by professional rules of conduct and may be open to professional discipline if they do not.[37] Whether it is through mandated compliance officers, lawyers' involvement in the management of legal services, or continued individual professional liability, it is licensed legal professionals that bare primary responsibility for ensuring that legal service enterprises that may be owned by non-lawyers are not in violation of professional rules.[38]

While non-lawyer ownership allows lawyers and non-lawyers to share profit rights, debates over whether or not to adopt such ownership have frequently been polarizing. Advocates have claimed non-lawyer ownership will transform legal services, increasing access to justice in the process, as opponents have maintained that this transformation will undercut professionalism. The next two sections briefly detail the most common arguments of those who advocate each of these positions.

B. NON-LAWYER OWNERSHIP AND THE TRADITIONAL ARGUMENT FOR ACCESS

Access to legal services is a long-standing challenge in Australia, the United Kingdom, and the United States. Studies done in each of these countries indicate that there are likely a significant number of people who could benefit from the help of a lawyer, but do not hire one because they either cannot afford a lawyer or are unaware of how one could assist them.[39] One 2009 Legal Services

(Austl.) (stating that a legal practitioner director must take all reasonable action to correct the misbehavior of a legal practitioner employed by the practice); *id.* § 153 (listing conduct of legal practitioner director as grounds the Supreme Court can disqualify an Incorporated Legal Practice).

35. *Legal Profession Act 2004* (NSW) s 140 (Austl.).

36. *Alternative Business Structures*, *supra* note 11, § 5.1 (noting that all ABS's must have one manager who is a recognized legal professional in England and Wales or in Europe).

37. *Legal Profession Act 2004* (NSW) s 143(1)(a) (Austl.).

38. As John Flood has noted reforms like the Legal Services Act 2007 in the United Kingdom may outwardly seem to liberalize the profession, but they also re-regulate it, furthering the interests of some actors, like large law firms, within the legal profession. John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation*, 59 CURRENT SOC. 507 (2011); *see also* Legal Services Act 2007, c. 29 (U.K.).

39. BDRC CONT'L, LEGAL SERVICES BENCHMARKING REPORT 15 (2012), https://research.legalservicesboard.org.uk/wp-content/media/2012-Individual-consumers-legal-needs-report.pdf [perma.cc/H79R-ESVF] (finding in the UK that the working class and the unemployed were more likely to take no action when faced with a legal problem) [hereinafter BDRC CONT'L]; CHRISTINE COUMARELOS ET AL., LEGAL AUSTRALIA-WIDE SURVEY LEGAL NEED IN AUSTRALIA 142 (2012), http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf [perma.cc/AKA7-NFT4] (finding that in Australia 30 percent of those who began to address a legal problem ended up not pursuing it further, perhaps because of lack of money); *see also* AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUST.: A SURVEY OF AMERICANS MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 28 (1994), http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf [perma.cc/H9EJ-DHSY] [hereinafter ABA LEGAL NEEDS] (noting that

Corporation survey in the United States found that for every client their funded programs served for a civil legal problem another potential client was turned away due to insufficient resources.[40]

Prominent legal scholars like Gillian Hadfield in the United States and regulators in countries like the United Kingdom contend that non-lawyer ownership will help overcome this problem by increasing access to legal services.[41] They support this claim primarily by arguing that outside capital will create new economies of scale, spur innovation, and generate new economies of scope and brands that will all benefit those in need of legal services.

Law firms that provide legal services for individuals have generally been small, consisting of solo practitioners or partnerships of a few lawyers.[42] Critics claim this form of service delivery is inefficient, as each lawyer or small legal practice invests independently in office space, administrative systems, advertising, and finding solutions to routine legal problems.[43] They argue outside capital allows legal services enterprises to achieve larger economies of scale allowing them to invest more in technology, administrative systems, and research into more efficient ways to deliver legal services.[44] This larger size also allows lawyers within the firm to specialize more in different areas of law.[45]

Non-lawyer ownership is seen as a way not only to address perceived under-capitalization in law firms, but also to recruit and retain high-value employees. Law schools generally do not train lawyers in management, technology, marketing, or other fields that are critical for running many legal

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"fear of the cost" was one of the principal reasons given by low income respondents for not using the civil justice system). For an overview of twenty-six large-scale legal needs surveys undertaken across two decades in 15 separate countries, see PASCOE PLEASANCE & NIGEL J. BALMER, HOW PEOPLE RESOLVE 'LEGAL' PROBLEMS 4 (2014) (amongst other findings, cost is a primary barrier to accessing lawyers).

40. LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW INCOME AMERICANS 1 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [http://perma.cc/WC94-KGFG] (last visited Oct. 31, 2015).

41. Gillian Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 DAEDALUS 1, 83 (2014) (finding that perhaps the largest barrier to access in the U.S. is an overly restrictive approach to regulating legal markets, including barring non-lawyer ownership); MKT. INTELLIGENCE UNIT DEPT. OF CONSTITUTIONAL AFFAIRS, GOVERNMENT CONCLUSIONS: COMPETITION AND REGULATION IN THE LEGAL SERVICES MARKET, Jul. 2003, at ¶ 47 (UK), http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/general/oftreptconc.htm#part5 [http://perma.cc/7MX5-T74D] [hereinafter MARKET INTELLIGENCE UNIT] (advocating for non-lawyer ownership on competition and efficiency grounds in the UK).

42. For a classic description of the two hemispheres of the bar in America—those who service large organizations, like corporations, and those who service the majority of individual consumers, see JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR, & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

43. Hadfield, *supra* note 6, at 49–50.

44. *See id.*; SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES 115, 139 (2004) [hereinafter CLEMENTI REPORT].

45. Hadfield, *supra* note 6, at 52; Traditional law firms can, and do, expand through bank loans or saved profits. However, loans frequently come with high interest rates that must be repaid by the firm and many partners may not want to forgo profit disbursements in order to expand.

service enterprises. Non-lawyer ownership allows firms to provide equity (instead of just salaried compensation) to non-lawyers with skills not as readily available in the legal profession, potentially leading to more innovative or efficient legal services.[46] Investor ownership may also improve leadership transitions in some situations, as removing poorly performing management will generally be easier if management is also not significant co-owners of the firm as are managing partners in most law firms.

An enterprise offering multiple types of services, including legal services, may also create new efficiencies.[47] For example, it might be more convenient for a customer to be able to access banking and legal services through one company and a company offering these multiple services may be able to save on shared overhead costs.

Finally, outside investment may allow legal service providers to scale and their brands to become better recognized so that consumers can more efficiently navigate the legal services market. If an already well-known brand offering other services begins to offer legal services a consumer can use their perception of the quality of the larger brand as a proxy for the quality of the legal services they provide.[48] Concerns about protecting the reputation of their larger brand may also create an added incentive for legal service enterprises to provide a quality product.

C. NON-LAWYER OWNERSHIP AND THE TRADITIONAL ARGUMENT FOR PROFESSIONALISM

Criticism of non-lawyer ownership is perhaps most developed in the United States where such ownership has been considered and repeatedly rejected by regulators.[49] Prominent critics have included decision makers at the American Bar Association, the New York Bar Association's Taskforce on Non-lawyer

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46. *See* Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 531 (2009) (noting that a publicly listed firm can be more efficiently organized and that employees remuneration can be better linked to the success of the firm); Ribstein, *supra* note 6, at 1723 (commenting that law firms may use the tournament of lawyers model because of the lack of options to reward employees with anything else, but the promise of management and financial rights combined with tenure); Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L. J. 953, 1010 (2012) (arguing non-lawyer ownership will allow these firms to attract other talented professionals).

47. *See* Interview 10, in Cambridge, Mass. (Feb. 4, 2014) [hereinafter Interview 10]. This interview, as well as the other interviews cited in this Article, was conducted with the understanding of confidentiality, and therefore no names are included. Instead the interviews are coded by number. Each number corresponds with an individual interview subject. Journal staff reviewed the notes from each interview to ensure the accuracy of the representations. The notes from the interviews are on file with the author. Interview 10 (Feb. 4, 2014).

48. Hadfield, *supra* note 6, at 49–50. For example, if Walmart started offering legal services, consumers could use their experience with the Walmart brand as a proxy for the quality of legal services they might receive.

49. *See infra* III.C.

Ownership, and vocal members of the profession such as Lawrence Fox.[50] Notably, few academics have publicly opposed non-lawyer ownership outright, although some have expressed notes of caution.[51] Critics of non-lawyer ownership claim that its access benefits are unproven[52] and that it will undermine professionalism,[53] imposing unreasonably high costs on clients, including low-income ones, as well as society as a whole. Non-lawyer ownership is seen to undercut professionalism by promoting commoditization, creating more conflicts of interest, and by increasing the likelihood that non-lawyers will be in a position to undercut professional standards.

Opponents of non-lawyer ownership argue that lawyers, and their firms, are acculturated towards a different set of goals than those owned by non-lawyers. Like Anthony Kronman's "Lawyer Statesman," legal professionals in this vision work to earn a living from their trade, but also to promote ideals that encourage public-spirited devotion to the law.[54] These critics contend that non-lawyer owners, in particular investor-owners, seek only to maximize the return on their investment because, unlike lawyers working in a firm, they are not personally invested in the labor of the enterprise.[55] Investor owned firms might focus exclusively on enhancing profits with little regard for the public good, which not only could harm the community, but also undercut one of the historical sources for the profession's legitimacy.[56] Non-lawyer owners may also be less likely to act as an independent check on state or corporate power.[57] While these critics generally acknowledge that law has become more like a business in recent years, with lawyers themselves more and more motivated by profit alone, they want to protect what remains of the profession's value system from further decline.[58]

Non-lawyer ownership brings the potential for lawyers to be caught in a conflict between their duties to investors and their duties to their clients or the

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50. *See generally* NYSBA REPORT, *supra* note 8, at 3; ABA COMMISSION ON MULTI-DISCIPLINARY PRAC., REP., ABA (1999), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpreport.html [http://perma.cc/UQZ5-RPSG] [hereinafter ABA COMMISSION]; Fox, *supra* note 20.

51. Robertson, *supra* note 6, at 180–81 (claiming that "few onlookers have attempted to defend the corporate practice doctrine" and citing to a handful of partial defenses. Although such a broad claim is likely too strong, as there have been many members of the bar who have argued against non-lawyer ownership, it is accurate to portray the academic literature as overwhelmingly supportive of non-lawyer ownership.).

52. *See* NYSBA REPORT, *supra* note 8, at 72 (noting lack of empirical data on the impact of non-lawyer ownership).

53. *See id.* at 73–74 (expressing concerning that non-lawyer ownership will undermine professionalism).

54. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1995).

55. *See* Benedict Sheehy, *From Law Firm to Stock Exchange Listed Law Practice: An Examination of Institutional and Regulatory Reform*, 20 INT'L J. LEGAL PROF., 3, 7 (2013).

56. *See id*. (noting that the one of the major concerns of non-lawyer ownership was that these businesses would "focus excessively on enhancing members' economic benefit without regard for the public good").

57. *See* Fox, *supra* note 20 (noting that lawyers working for non-lawyer owned companies would be less likely to work on death penalty or other high profile and controversial pro bono matters).

58. *See* Adams & Matheson, *supra* note 6, at 23.

justice system.[59] For example, Shine Lawyers, a publicly owned law firm in Australia, makes clear in its prospectus to potential investors that their first duty is to the courts, then clients, and then shareholders.[60] These duties, in this order, are also laid out in Australian law.[61] This example signals there is a potential regulatory solution to this conflict, but it also suggests that non-lawyer ownership creates conflicts different than those previously faced by the profession. Before non-lawyer ownership, it may have been in lawyers' self-interest to take actions that would further the financial interests of the firm, but a sense of professional duty or the firm's culture may have tempered such actions if they conflicted with a client's interests. In a world of non-lawyer ownership, investors may try to create new demands on a firm, and the lawyers within it, to prioritize commercial interests.

While many criticisms of non-lawyer ownership are directed at non-lawyer owners, others are directed more specifically at the dangers of having multiple kinds of employees, often offering multiple services, in the same firm. Some argue that non-lawyer managers and other employees may be more likely to violate legal ethics, not because lawyers have superior morality, but because lawyers are trained and duty-bound to look for conflicts, prize confidentiality, and uphold other professional rules.[62] As legal and non-legal work becomes more integrated, and entangled, within the firm employees may also be more likely to engage in the unauthorized practice of law or share confidential client information across different departments of the company.[63]

D. TOWARDS A NEW UNDERSTANDING OF NON-LAWYER OWNERSHIP

Participants in the debate over non-lawyer ownership have argued for two dueling, if not necessarily conflicting, claims: (1) that non-lawyer ownership will significantly increase access to legal services; and (2) that such ownership will negatively impact professionalism. While both sides to the debate bring insight, the actual effect of non-lawyer ownership is likely to be quite different than either

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59. Arthur J. Ciampi, *Non-Lawyer Investment in Law Firms: Evolution or Revolution?* 247 N.Y. L. J. 3 (2012) (arguing that non-lawyer ownership places lawyers in a conflict between the best interests of their clients and having to answer to their non-lawyer partners).

60. SHINE LAWYERS, PROSPECTUS 40 (2013), https://www.shine.com.au/wp-content/uploads/2013/10/shine_corporate_limited_prospectus.pdf [https://perma.cc/XWG8-YX8K] ("Shine has a paramount duty to the court, first, and then to its clients. Those duties prevail over Shine's duty to Shareholders.") [hereinafter SHINE PROSPECTUS].

61. *Legal Profession Act 2004* (NSW) ss 161–163 (Austl.) (noting that the legislation is given precedence over the company's Constitution and allows the regulations associated with the Legal Profession Acts to displace the operation of the Corporations Act).

62. ABA COMMISSION, *supra* note 50 ("The Commission is particularly mindful that the principal arguments . . . for retaining such prohibitions relate to concerns about the profession's core values, specifically professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest.").

63. Adams & Matheson, *supra* note 6, at 21.

of these traditional accounts suggest in at least three ways that are briefly laid out in this section, before being returned to again in more detail in Part III where they are supported by the country studies presented in Part II.

First, arguments over non-lawyer ownership tend to be too abstract. Non-lawyer ownership should not be thought of as having the same impact in every context—it matters who the non-lawyer owners are and what legal sector or jurisdiction is at issue. A legal services firm owned by consumer owners or worker owners is likely to respond to a different set of incentives and have a different set of potential conflicts of interest than a firm owned by outside investors or owners that also offer other services in the market. Some sectors of legal services may attract more non-lawyer investors than other sectors because they are perceived to be more lucrative or easier to standardize or scale. Countries with larger capital and legal services' markets could see greater amounts and types of non-lawyer ownership. Meanwhile, non-lawyer ownership may be more or less likely depending on the specifics of the regulation allowing it, while a jurisdiction's other professional rules may also influence whether and how it develops. Accounting for these variables can help predict the effect non-lawyer ownership will have in different situations. For example, non-lawyer ownership may have little impact in the immigration sector in a relatively small jurisdiction where such ownership is highly regulated, but it may have a transformative impact that requires regulatory attention in the personal injury sector in a large jurisdiction where major commercial conglomerates enter the market.

Second, even though non-lawyer ownership may lead to more innovation in legal services, greater competition, and larger economies of scale there is reason to doubt that these changes will lead to significantly more access to legal services for poor and moderate income populations. Non-lawyer owners are likely to be attracted to legal sectors, like personal injury, that are relatively easy to commoditize and where expected returns are high. However, these lucrative sectors are less likely to have an access need because of long-standing practices like conditional or contingency fees. More generally, many areas of legal work may be difficult to scale or commoditize, such as aspects of family or immigration law that require significant tailoring to the specific situation of the client, meaning non-lawyer ownership will be less likely to occur in these areas or bring unclear access benefits. Even where commoditization is possible, persons with civil legal needs frequently have few resources and complicated legal problems. In this context, non-lawyer ownership is unlikely to provide these persons with significant new legal options, as they will still be unable to afford legal services. Finally, cultural or psychological barriers may cause some persons to resist purchasing some types of legal services. In other words, there may not be as much price elasticity in the market for some legal services as advocates of deregulation suggest.

Finally, those who oppose non-lawyer ownership on the grounds that it will undercut professionalism tend to make arguments that are both too wide and too

narrow. Many non-lawyer owned firms are likely to operate in ways quite similar to lawyer owned firms or at least in ways unlikely to create any serious new professionalism concerns. This though does not mean that no new professionalism concerns arise with non-lawyer ownership. The interests of clients and non-lawyer owners are likely to sometimes conflict, placing new pressures on lawyers. These conflicts seem most likely where non-lawyer owners have other well-defined commercial interests, such as in the case of a large corporation that offers multiple other services in the market.[64] In some situations, non-lawyer ownership may also undermine the public-spirited ideals of the profession, making it less likely lawyers in these firms will engage in pro bono or take on riskier cases that may have a broader social benefit. Lastly, while some have claimed that non-lawyer ownership will lead to an increase in quality of legal services, it is not obvious this will be the result and in some instances pressure by investors could undercut standards in the profession.

II. COUNTRY STUDIES

To illustrate the arguments laid out at the end of Part I, the three country studies in this Part explore the impact of non-lawyer ownership on access and professionalism for civil legal services for poor and moderate-income populations.[65] While non-lawyer ownership may have access benefits for other groups as well, it is poor and moderate-income individuals that are often excluded from legal services altogether and have justifiably been the primary focus of access advocates.[66]

In the three countries studied, the available quantitative data on legal services is limited. None of the jurisdictions has reliable or systematic data on the price of civil legal services, although England and Wales are beginning to collect some of this information.[67] Given these restrictions, in each country examined this Article first attempts to determine where there has been significant investment in legal services by non-lawyers. If there is no significant non-lawyer ownership in a sector it is unlikely that such ownership is having a large impact on access or professionalism. In sectors where there has been significant non-lawyer ownership it undertakes qualitative case studies of particularly prominent instances of non-lawyer ownership in enterprises that provide services that are aimed, at least

64. Perhaps the most obvious example of such a conflict, albeit in the criminal context, would be a company that offers criminal defense services and also runs prisons. *See, e.g.*, MODEL RULES R. 1.8(a) ("A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client . . . .").

65. This Article examines how non-lawyer ownership may increase access for this population by increasing awareness of relevant legal options, reducing their price, or increasing their quality at the same or a lower price.

66. *See, e.g.*, RHODE, *supra* note 1, at 187 (for an overview of efforts to increase access to civil legal services in the United States and a proposed agenda).

67. Pricing data has been collected for conveyancing, divorce, and probate services in the United Kingdom for 2012. *See* BDRC CONTINENTAL, *supra* note 39.

in part, at low or moderate income populations. These case studies focus on examining new models of delivering legal services seemingly spurred by non-lawyer ownership, as it posits this type of innovation is most likely to lead to significant gains in access or to raise new professionalism concerns.[68] Data was collected from public sources, including through special requests to regulators and government agencies, as well as through institutional review board (IRB) approved interviews with key participants.[69]

Given the limitations of the available data, and the complexity of the functioning of legal markets, this study should be treated as an initial attempt to demonstrate non-lawyer ownership's impact on access and professionalism, to be supplemented with further research. Nevertheless, drawing from available evidence does allow one to make, plausible arguments about non-lawyer ownership's most likely influence. Focusing on concrete examples also forces all sides in the debate to more carefully develop, and limit, their claims, while reexamining their normative commitments in the light of potentially contradictory evidence.[70]

A. UNITED KINGDOM

Some background is helpful to appreciate the momentous regulatory changes in the legal services market in the United Kingdom, and specifically England and Wales, over the last several years. While in some jurisdictions there is only one type of legal professional—i.e. lawyers—in England and Wales there are eight types of licensed legal professionals: barristers, solicitors, notaries, conveyancers, legal executives (a type of para-legal), patent attorneys, trademark attorneys, and costs lawyers (who can settle the legal costs of a court case).[71] While the division between barristers, solicitors, and notaries is old, the other types of licensed legal professionals are of more recent origin and were created in part to provide more affordable services by allowing individuals to specialize in areas of

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68. *See* CLAYTON M. CHRISTENSON, THE INNOVATOR'S DILEMMA (2011) (describing how disruptive technology can lead to large new efficiency gains, undercutting earlier models of doing business).

69. To capture a more complete view–which included minority and contradictory perspectives–the author interviewed executives at non-lawyer owned legal service providers, competitors, regulators, representatives of the bar, academics, and those in non-profit organizations offering services to under-served populations. The author chose initial interview subjects through publicly available information on non-lawyer ownership and then followed a snowball interview method of selection.

70. Case studies in particular can be used to present us "with unfamiliar situations that inspire tentative moral judgments, which may destabilize the web of normative conviction we bring to them when we examine the connections among its elements." David Thacher, *The Normative Case Study*, 111 AM. J. SOC. 1631, 1669 (2006).

71. *See* Approved Regulators, LEGAL SERV. BD., http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm [https://perma.cc/NF5M-MGUP] (last visited Oct. 31, 2015) (these eight types of licensed legal professionals each have their own regulator. Two accountant associations are also authorized to license accountants for special probate activities, but currently do not do so).

legal practice without as much training as a solicitor or barrister.[72]

Since at least Margaret Thatcher's government there has been a strong deregulatory push in legal services in the UK.[73] In 2004, a report by Sir David Clementi, which built on a previous study by the UK's competition agency,[74] recommended a series of regulatory changes to the legal profession.[75] These proposals culminated in Parliament passing the Legal Services Act (the Act) in 2007.

The Act implemented two primary changes. The first concerned regulatory agencies. The Act separated the advocacy and disciplining functions of the bar by creating an independent Legal Ombudsman to address consumer grievances.[76] It also separated the advocacy and regulatory functions of the bar by, for example, creating the Solicitor Regulatory Authority (SRA) as the independent regulatory arm of the Law Society.[77] To oversee the eight independent frontline regulators of each type of legal professional in England and Wales the Act created the Legal Services Board (LSB), which acts as a "meta-regulator."[78] Second, the Legal Services Act allowed for Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs).[79] LDPs, the first of which were licensed in 2009, permit different types of legal professionals to own and manage law firms together (for example, solicitors and barristers can practice together in a LDP, while previously they had to practice in separate firms).[80] ABSs began to be licensed in 2011 and can be fully owned by non-lawyers as well as offer non-legal services alongside legal services.[81]

These reforms were brought about to increase competition, make the market more consumer friendly, and increase access to legal services for those without

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72. Some of these other professions also formalized the role non-licensed individuals were already performing. For a short history of the origins of these licensed legal professionals, see LEGAL SERV. INST., THE REGULATION OF LEGAL SERVICES: RESERVED LEGAL ACTIVITIES—HISTORY AND RATIONALE (Aug. 2010), http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf [https://perma.cc/D5AB-YZE2?type=source].

73. For an excellent history of the reforms that were instituted in the English legal profession in the 1980s and 1990s, see RICHARD ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2003).

74. In a 2001 report the Office of Fair Trading pointed to uncompetitive practices in the legal profession that it argued needed to be reformed. *See* OFFICE OF FAIR TRADING, COMPETITION IN PROFESSIONS (2001), http://www.oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf [https://perma.cc/F33B-3DTL].

75. *See* CLEMENTI REPORT, *supra* note 44.

76. *See* Legal Services Act 2007, c. 29, § 115 (UK).

77. *See How We Work*, SOLIC. REG. AUTHORITY, http://www.sra.org.uk/sra/how-we-work.page [https://perma.cc/7KDS-GWZ2] (last visited Oct. 31, 2015).

78. *See* Approved Regulators, LEGAL SERV. BD., http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm [https://perma.cc/NF5M-MGUP] (last visited Oct. 31, 2015).

79. *See* Legal Services Act 2007, c. 29, § 5 (UK) (setting out the legal basis for ABSs); *see also Legal Disciplinary Practice*, L. SOC'Y (Apr. 6, 2011), http://www.lawsociety.org.uk/advice/practice-notes/legal-disciplinary-practice/#ldp2 [perma.cc/GV65-8LHG] (describing the legal basis for LDPs) [hereinafter *Legal Disciplinary Practice*].

80. *See Legal Disciplinary Practice*, *supra* note 79.

81. *See generally Alternative Business Structures*, *supra* note 11 (describing how ABSs operate).

them.[82] Although most ABSs licensed so far are traditional law firms simply adopting a new form, many are new actors in the legal services with new business models.[83] The reforms have also caught the attention of foreign investors. The publicly listed Australian law firm, Slater & Gordon, became an ABS in 2012 and subsequently bought several personal injury and general service law firms across the country to become a major market player.[84] LegalZoom, a U.S. online legal service provider, has also received an ABS license and announced a partnership with a major UK law firm network.[85]

Deciphering the impact of non-lawyer ownership of legal services in England and Wales can be challenging. Not only did ABSs begin to be licensed only in late 2011,[86] but shortly after the Legal Services Act was passed the 2008 financial crisis undercut the demand for legal services, especially in certain sectors such as real estate.[87] Due to increased pressure on the budget and longstanding belt-tightening trends, the government implemented major cuts to the legal aid system in April 2013 (the UK has traditionally spent more per capita on legal aid than most other countries).[88] These cuts reduced fees paid to lawyers for legal aid and eliminated legal aid for many family law, housing, employment, welfare, debt, and immigration matters, as well as created a residency test and a more stringent means cutoff for beneficiaries.[89] Since legal aid has traditionally been through government contracting with private lawyers these cuts have created downward pressure on salaries in the overall legal services market.[90]

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82. *See* MARKET INTELLIGENCE UNIT, *supra* note 41; *see also* CLEMENTI REPORT, *supra* note 44, at 105.

83. As of 2014, about a third of licensed ABS firms were new entrants, while the others were law firms that had already been in existence and converted to ABSs. SOLIC. REG. AUTHORITY, RESEARCH ON ALTERNATIVE BUSINESS STRUCTURES: FINDINGS WITH SURVEYS OF ABSS AND APPLICANTS THAT WITHDREW FROM THE LICENSING PROCESS 10 (2014) [hereinafter SOLICITORS REGULATORY AUTHORITY].

84. As of 2014, Slater & Gordon had more than 1200 staff in eighteen offices. *See* Neil Rose, *Slater & Gordon Completes Panonne Acquisition and Hints at Yet More to Come*, LEGALFUTURES (Feb. 17, 2014), http://www.legalfutures.co.uk/latest-news/slater-gordon-completes-pannone-acquisition-hints-yet-come [https://perma.cc/8JFN-QZP2] [hereinafter Rose, *Slater & Gordon Completes Panonne Acquisition*].

85. *See* John Hyde, *LegalZoom Enters Market with ABS License*, L. SOC'Y GAZETTE (Jan. 7, 2015), http://www.lawgazette.co.uk/practice/legalzoom-enters-market-with-abs-licence/5045879.fullarticle [https://perma.cc/8WQC-3RDS].

86. Neil Rose, *Future of Law: Big Brands and Alternative Business Structures*, GUARDIAN (Oct. 12, 2012), http://www.theguardian.com/law/2012/oct/12/brands-alternative-business-structures [http://perma.cc/MF38-32G3] [hereinafter Rose, *Future of Law*].

87. *See* PASCOE PLEASENCE, NIGEL J. BALMER & RICHARD MOORHEAD, A TIME OF CHANGE: SOLICITORS' FIRMS IN ENGLAND AND WALES 2–3 (2011), https://research.legalservicesboard.org.uk/wp-content/media/time-of-change-report.pdf [https://perma.cc/K2KZ-WLV3] (detailing a general fall in the demand for legal services after the financial crisis, particularly around real estate transactions and probate).

88. *See* John Flood & Avis Whyte, *What's Wrong with Legal Aid? Lessons from Outside the UK*, 25 CIV. JUST. Q. 80, 84 (2006). On cuts to the legal aid system, see Owen Bowcott, *Labour Peer Condemns Legal Aid Cuts*, GUARDIAN (May 2, 2012), http://www.theguardian.com/law/2012/may/02/labour-peer-legal-aid-cuts_[https://perma.cc/9YLB-5SXU] [hereinafter *Labour Peer*].

89. *See Labour Peer*, *supra* note 88.

90. For the first time in their history barristers in the country went on strike in January of 2014 to protest these changes, indicating both the perceived severity of the cuts to the legal system and the profession. Owen Bowcott,

Despite this turmoil, the available data does allow us to see where Alternative Business Structures have and have not entered the market. As of August 2014, there were over 360 ABSs, most of which had been licensed by the Solicitor Regulatory Authority (SRA).[91] The ABS firms licensed by the SRA are

TABLE 2:
ABS MARKET PRESENCE IN DIFFERENT LEGAL SECTORS REGULATED BY SOLICITOR REGULATORY AUTHORITY BETWEEN OCTOBER 2012 AND SEPTEMBER 2013.[93]

	ABS market share (%) of Sector	Number of ABSs in Sector	Number of ABSs > 50% of Business in Sector
Children	3.47%	33	0
Consumer	19.77%	6	0
Criminal	2.87%	34	7
Debt Collection	3.73%	46	3
Employment	6.07%	94	5
Family/Matrimonial	5.27%	76	5
Intellectual Property	2.46%	16	1
Landlord/Tenant	3.45%	57	2
Litigation (Other)	4.26%	112	18
Mental Health	23.49%	6	1
Non Litigation Other[92]	16.80%	64	5
Personal Injury	33.53%	102	53
Probate Estate Administration	4.78%	67	0
Property Commercial	3.19%	73	0
Property Residential	3.03%	78	2
Social Welfare	11.96%	5	0
Wills Trusts Tax Planning	3.35%	89	7

Barristers and Solicitors Walk out Over Cuts to Legal Aid Fees, GUARDIAN (Jan. 5, 2014), http://www.theguardian.com/law/2014/jan/05/barristers-solicitors-walkout-legal-aid-cuts [http://perma.cc/Q7V6-CRST].

91. Nick Hilborne, *SRA Now Licensing More Than 300 ABSs*, LEGALFUTURES (Aug. 6, 2014), http://www.legalfutures.co.uk/latest-news/sra-now-licensing-more-than-300-abss [http://perma.cc/GSR7-8F3R].

92. "Non Litigation Other" is a catchall category that includes work that does not fit neatly into other categories when they self-report. It is unclear what types of work firms might be including in this category. Email from CBT to author (June 13, 2014) (on file with author).

93. SOLICITORS REGULATORY AUTHORITY, *supra* note 83, at 12, supplemented with data provided in email correspondence with SRA (June 13, 2014).

disproportionately concentrated in certain sectors, particularly personal injury, where in 2012–2013 ABS firms accounted for 33.5 percent of the market share.

Following personal injury, ABSs have had the biggest share of revenue in consumer, social welfare, and mental health law, although each of these sectors had a relatively small number of actual ABSs.[94] Consumer law includes product liability cases, mental health law contains mental health malpractice, and social welfare law includes disability benefits, so these legal services may be being offered by larger personal injury firms.[95] Corporate law, financial advice, civil liberties and immigration are left out of the above table because in these categories less than two percent of market share were with ABSs.[96]

The next two sub-sections examine in more detail the initial impact of ABSs in the UK in two legal sectors: personal injury and family law. These examples highlight both how ABS firms are transforming these sectors, but also that these transformations do not necessarily bring improvements in access and can raise some professionalism concerns.

1. PERSONAL INJURY AND THE INSURANCE INDUSTRY

The rush of ABS licensed firms into the personal injury market has created new innovations, brought in new types of investors, and generated larger economies of scale.[97] However, the access benefits so far have been questionable and some of these ABSs have also created the possibility for new types of conflict of interest and helped actors bypass professional regulations.

The rapid growth of non-lawyer ownership in personal injury is not particularly surprising. The personal injury market is both historically large and, at least in recent years, disproportionately profitable, making it a clear target for outside investors.[98] Personal injury firms also require capital-intensive upfront costs, both to solicit claims through advertising and then to screen those claims.[99]

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94. This work constituted over fifty percent of business for only one ABS. *Id*.

95. *Id*.; Nick Hilborne, *ABSs Capture a Third of Personal Injury Market, SRA Research Reveals*, LEGALFUTURES (June 12, 2014), http://www.legalfutures.co.uk/latest-news/abss-capture-third-personal-injury-market-sra-research-reveals [http://perma.cc/LP6G-8F6J].

96. Email from SRA to author (June 13, 2014) (on file with author).

97. Quindell, discussed in this section, is an example of a firm with a new business model, outside investors, and a larger economy of scale. *Infra* note 117.

98. Previous research found firms that were more productive were most likely to operate in the injury market segment. LEGAL SERV. BOARD, EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS 6 (Oct. 2013), https://research.legalservicesboard.org.uk/w(on file with author)u 2015)ls,gler mentions. Is this what the author intended to cite back to?r that it comes from the same sop-content/media/Changes-in-competition-in-market-segments-REPORT.pdf [https://perma.cc/Q56V-37YL] [hereinafter LSB 2013]. The sector accounted for £1.8 billion in 2011 or about 12 percent of all legal turnover for solicitors in the United Kingdom. *Id*. at 4.

99. The need for larger investment in advertisement led to the growth of claims management firms in the United Kingdom before the 2013 ban on referral fees. LONDON ECON., ACCESS TO JUSTICE: LEARNING FROM LONG TERM EXPERIENCES IN THE PERSONAL INJURY LEGAL SERVICES MARKET 17 (2014), https://research.

There are regulatory reasons unique to the UK that likely helped spur non-lawyer investment as well. The government banned referral fees in April 2013 after a report recommending their prohibition by Justice Rupert Jackson to the Ministry of Justice.[100] This ban, and its anticipation, arguably sped the entry of ABSs into the personal injury market. Large insurance companies had previously made money off of the referral of their customers to personal injury lawyers after they had been in auto accidents.[101] Instead of losing this lucrative source of revenue, insurance companies have instead invested in their own law firms to which they can refer cases without charging a fee, but still benefit from the subsequent profits.[102] Meanwhile, large personal injury law firms, like Slater & Gordon, have bought law firms with well recognized brands and invested in advertising to ensure a steady supply of clients in the wake of the referral fee ban.[103]

Many lawyers have criticized insurance companies for bypassing restrictions on referral fees by setting up their own legal practices. As one prominent UK personal injury lawyer noted,

> The referral fee ban was ostensibly at least a principled one, i.e. distaste in selling the right to act for an injured person. It seems a strange solution to that problem, to allow those referrers now to own [a solicitor's practice] rather than simply be paid by a solicitor's practice a referral fee, and to somehow conclude this is better.[104]

Indeed, beyond a general "distaste" for referral fees, the Jackson report criticized the referral system for not helping consumers find the best quality lawyer for their claim, but rather guiding them towards the lawyer who would pay the referrer the highest price.[105] Consumers who are directed to an ABS

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legalservicesboard.org.uk/wp-content/media/Access-to-Justice-Learning-from-PI.pdf [http://perma.cc/Q56V-37YL] [hereinafter LEARNING FROM LONG TERM EXPERIENCES].

100. RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 203-206 (Dec. 2009), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf [https://perma.cc/JE44-6XRQ]; *Claims Management Company Regulations, Guidance and Legislation*, MINISTRY OF JUSTICE (Jan. 23, 2015), http://www.justice.gov.uk/claims-regulation/information-for-businesses/referral-fees-ban-in-personal-injury-cases [https://perma.cc/A4JP-4UPW?type=source] (detailing April 2013 ban created by Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) [hereinafter MINISTRY OF JUSTICE].

101. Before the referral fee ban over fifteen percent of personal injury solicitor firms received over fifty percent of their business through referrals. LSB 2013, *supra* note 98, at 53.

102. *See* Neil Rose, *ABS-Owning Insurers Sign up to Code on Handling Legal Work for Policy Holders*, LEGALFUTURES (Feb. 14, 2014), http://www.legalfutures.co.uk/latest-news/abs-owning-insurers-sign-code-handling-legal-work-policyholders [https://perma.cc/TL5Q-4CEL?type=source] [hereinafter Rose, *ABS-Owning Insurers*].

103. *See* Interview 1, in London, Eng. (Jan. 9, 2014) [hereinafter Interview 1].

104. Email 21 (Apr. 7, 2014) (on file with the author and with Geo. J. Legal Ethics).

105. JACKSON, *supra* note 100, at 203–206. Importantly, the report also criticized referral fees for increasing the price of the overall personal injury litigation process by adding more players and costs. *Id*.

because their insurance company owns it similarly seem to be referred simply because of the monetary benefit to the insurance company and not because the referral is necessarily in the consumer's best interest.

One ABS, Quindell, which is listed on the Alternative Investment Market (AIM) on the London Stock Exchange, has bypassed the referral ban even though it is not owned by an insurance company.[106] Instead, Quindell sells claims management services.[107] Its agents staff telephone hotlines that are the first point of contact for customers when they call insurance companies after an auto accident.[108] The agent then alerts the insurance company to the claim, but also offers a package of other services to the customer including roadside assistance, vehicle repair, car rental, rehabilitation medical support, and legal services.[109] Since Quindell agents are the first point of contact with customers, recommending them to their legal services arm is not technically a banned referral.[110] This strategy has been profitable, increasing Quindell's reported revenue from £163 million (with £52 million in profit) in 2012 to £380 million (and £137 million in profit) in 2013.[111] Some though have questioned whether the company is subverting the referral fee ban[112] or whether having medical evidence for a personal injury client provided by the same company that provides legal representation for the client creates a conflict of interest.[113] One particularly critical report of Quindell's business strategy (written by a firm short selling its stock) led Quindell's shares to lose almost half their value, or about £1 billion, in one day in April 2014.[114]

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106. Rory Gallivan, *Quindell Mulls U.S. Listing After Move to London Premium List Blocked*, WALL STREET J. (June 11, 2014), http://online.wsj.com/articles/quindell-mulls-u-s-listing-after-move-to-london-premium-list-blocked-1402498223 [http://perma.cc/5UJ3-QY2G].

107. QUINDELL, QUINDELL PORTFOLIO PLC INVESTOR TEACH-IN & TRADING UPDATE 21 (2013) (describing how Quindell pays to be first notice of loss contact point). Quindell also receives a significant portion of its clients through direct customer outreach and other intermediaries.

108. *Id.*

109. *Id.*

110. *Id.*; *see also* Neil Rose, *Quindell Targets Huge Staff Growth and Higher Value Cases*, LEGALFUTURES (June 19, 2014), http://www.legalfutures.co.uk/latest-news/quindell-targets-huge-staff-growth-higher-value-cases [https://perma.cc/Y2GN-SQ3S?type=source] [hereinafter Rose, *Quindell Targets Huge Staff Growth*].

111. Stephen Joseph, *Investor Relations*, QUINDELL (Sept. 14, 2015), http://www.quindell.com/investors/ [https://perma.cc/5NRP-BYLL].

112. Richard Moorhead, Lawyer Watch, *After Referral Fees—Ethical Personal Injury Practice?* LAWYER-WATCH (Mar. 21, 2014), http://lawyerwatch.wordpress.com/2014/03/21/after-referral-fees-ethical-personal-injury-practice/ [https://perma.cc/BJD8-QKMN?type=source] (noting how First Notification of Loss Services (like Quindell) have the effect of bypassing the referral fee ban).

113. Interview 18, in London, Eng. (July 7, 2014).

114. Although this report seems to have been produced by an American trading firm shorting Quindell's stock, the market's reaction may indicate a larger unease about their business model. Neil Rose, *Quindell Launches Legal Action Over 'Shorting Attack,'* LEGALFUTURES (April 25, 2014), http://www.legalfutures.co.uk/latest-news/quindell-launches-legal-action-shorting-attack [https://perma.cc/8J6U-GYND?type=source] [hereinafter Rose, *Quindell Launches Legal Action*].

While it is in the short-term interest of insurance companies, or companies they contract with like Quindell, to have those they insure succeed in claims against third party insurance companies, it is in the interest of the insurance industry overall to keep the cost of claims down. This raises questions about whether there is an inherent conflict in having personal injury firms owned by insurers even if they do not bring cases against the insurers that own them.[115] Before the ban on referral fees, some personal injury firms had bulk contracts with insurance companies to provide the firm with cases and this perhaps meant these law firms were careful not to be too aggressive against the insurance industry.[116] However, such an arrangement still created some distance between insurance companies and personal injury law firms.

In February 2014, many of the major insurance companies with ABSs signed a voluntary code of conduct.[117] Amongst other provisions, in the code they agreed that they and any party they might refer customers to would whenever possible settle their customers' claims through a government and stakeholder sanctioned claims portal and in a manner that does not unreasonably increase legal costs for the at-fault insurer.[118] Such codes of conduct raise concerns that the insurance industry is actively trying to shape its ABSs' legal practice to keep insurance companies costs as low as possible, which may, or may not be, in the best interests of those who have been injured.

More generally, insurance companies have traditionally lobbied for regulation to limit the amount of compensation paid in personal injury cases, while personal injury lawyers have lobbied for regulation that would allow for greater compensation.[119] Having insurance companies capture a large part of the

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115. There is no outright prohibition on an insurance company owned ABS bringing an injury case against the insurance company that owns them. However, the Solicitors Regulation Authority Handbook provides a set of principles that all solicitors must follow. Principle 3 states, "[y]ou must not allow your independence to be compromised," and Principle 4 states, "[y]ou must act in the best interests of each client." Both of these principles would seem to bar solicitors from acting against the company that owns their firm on behalf of their client. SOLIC. REG. AUTH., *SRA Principles 2011* (2011), http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page [http://perma.cc/66J7-VREV].

116. Interview 17, in London, Eng. (July 3, 2014).

117. ASS'N OF BRITISH INSURERS, SUPPORT FOR CUSTOMERS WITH ROAD TRAFFIC INJURIES: THE ABI CODE (July 1, 2015), https://www.abi.org.uk//media/Files/Documents/Publications/Public/2014/personal%20injury/Customers%20with%20Road%20Traffic%20Injuries%20The%20ABI%20Code.ashx [https://perma.cc/B7P7-YYCQ]; Rose, *ABS-Owning Insurers, supra* note 102.

118. ASS'N OF BRITISH INSURERS, *supra* note 117, at § 22(i); Rose, *ABS-Owning Insurers*, *supra* note 102. In the code of conduct signatories also agreed to alert customers they were referring of their relationship with their ABS and also not to pressure customers into making claims or refer clients to third parties who might. ASS'N OF BRITISH INSURERS, *supra,* note 117, at §§ 15–16.

119. The Association of Personal Injury Lawyers undertakes multiple lobbying efforts on behalf of UK personal injury lawyers. *See Parliamentary Room*, ASS'N OF PERS. INJ. L., http://www.apil.org.uk/parliamentary-room [http://perma.cc/P5QT-D82Y] (last visited Oct. 9, 2015). The Association of British Insurers undertakes lobbying efforts for the UK insurance industry. *See About Us,* ASS'N OF BRITISH INSURERS, https://www.abi.org.uk/About [http://perma.cc/9MWW-DQ6H] (last visited Oct. 31, 2015).

personal injury sector upsets this political balance and could lead to regulation more favourable to insurance companies in the future.

While ABSs owned by insurance companies raise a number of potentially serious conflicts of interest, the access benefits of ABSs in the personal injury market have yet to be demonstrated.[120] In fact, there has been a decline in personal injury claims made in the United Kingdom from 2011–2012 to 2014–2015.[121] This recent drop has been led by motor claims, which account for about three-quarters of all personal injury claims and reduced about 8 percent from 828,489 claims in 2011–2012 to 761,878 claims in 2014–2015.[122] It is important to note that between 2011–2012 and 2014–2015 there has been a 35 percent jump in clinical negligence claims (which numbered 18,258 in 2014–2015) and an 18 percent jump in claims against employers (which numbered 103,401 in 2014–2015).[123] While this data indicates that the entry of ABSs into the market have failed to halt a decline in the overall number of injury claims, and motor accident claims in particular, without further information it is not possible to speculate about ABSs impact. The decline in motor vehicle claims and the recent rise of claims in clinical negligence and against employers could be caused by the emergence of ABSs, but also the recent referral fee ban, broader reforms in the personal injury sector, a change in the number of motor accidents,[124] a recent rise in hearing loss claims in the country,[125] or other factors.

Yet, there are other reasons to believe that ABSs may not be having a significant direct impact on access in personal injury matters. In 2010–2011, before ABSs were licensed, ninety-seven percent of those who brought a personal injury matter in England and Wales reported they did not pay for their solicitor because the solicitor was compensated by their insurance company, was contracted under a no win no fee arrangement, or was provided through legal aid,

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120. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 38 ("It is clear that ABSs have already had a big impact on the personal injury market. However, it is not yet possible to assess whether this had led to an increase in access to justice.").

121. All parties in the UK who receive a claim against them for a personal injury matter must register with the government's Compensation Recovery Unit, which recovers social security and National Health Service costs in certain compensation and personal injury cases. *Collection*, COMP. RECOVERY UNIT, https://www.gov.uk/government/collections/cru [https://perma.cc/E2QU-UPCE] (last updated June 8, 2015) [hereinafter COMP. RECOVERY UNIT DATA]; data on the number of personal injury claims taken from excel file available at the Compensation Recovery Unit's website.

122. *Id.*

123. *Id*. For a fuller discussion of what might be causing the trends in different categories of personal injury, *see* LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 25–28.

124. Road injuries and deaths have been steadily declining in the United Kingdom in recent years (on average down 4.7 percent each year since 2006, including 2012 and 2013). *See Reported Accidents, Vehicles & Casualties*, DEPT. FOR TRANSPORT, https://www.gov.uk/government/statistical-data-sets/ras40-reported-accidents-vehicles-and-casualties [https://perma.cc/YY6G-YFRZ] (last updated Sept. 24, 2015) (click on link for Table RAS40001).

125. Mark Sands, *25% of UK Workforce at Risk of Noise Induced Hearing Loss*, POST, May 27, 2014 (noting a forty percent increase in hearing loss claims since the introduction of the Jackson Committee reforms in 2013).

a trade union, or some other source.[126] Given the nature of this market, it would seem that large shifts in the number of people who can make personal injury claims are more likely to be driven by changes in the structure of conditional fee arrangements or calculations within the insurance industry on when they should fund claims, rather than by the emergence of ABSs.

2. FAMILY LAW AND CO-OPERATIVE LEGAL SERVICES

Co-operative Legal Services is part of the Co-operative Group, which was founded in 1863, is owned by its almost eight million members, and has 3,500 retail outlets throughout the country.[127] The Co-operative is known in particular for its grocery stores, pharmacies, banks, and services in funeral care and farming. In 2006 the Co-operative began offering legal services to its members and in 2012 they were granted an ABS license to provide these services to the general public.[128] Co-operative Legal Services is one of the most prominent examples of an ABS offering a broad range of civil legal services to a diverse customer base. Many observers, including those inside the Co-operative,[129] see Co-operative Legal Services as a way to increase access through economies of scale and scope. However, it is unclear how much the Co-operative has been able to actually increase access and its larger business model is still unproven.

In 2014, Co-operative Legal Services had a staff of 342 and a £23 million annual turnover.[130] Its major areas of work were probate, personal injury, and family law.[131] Co-operative's funeral, financial, and other arms are able to refer clients to its legal services, and Co-operative Legal Services advertises heavily in the Co-operative Group's chain of grocery stores.[132] Co-operative Legal Services primary offices are in London, Manchester, and Bristol, but they service many of their customers via phone.[133] They claim that by investing in infrastructure and quality control systems they can provide a better service at a more affordable price.[134]

The Co-operative is unique in being member owned and committed to a larger social mission. The Co-operative claims it does not aim to make a profit from its

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126. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 31–32.

127. *About Us*, THE CO-OPERATIVE. GRP., http://www.co-operative.coop/corporate/aboutus/ http://perma.cc/72KU-AT6D] (last visited Oct. 9, 2015); *Who We Are*, THE CO-OPERATIVE. GRP., http://www.co-operative.coop/corporate/aboutus/an-introduction/ [http://perma.cc/Z3S8-J2YL] (last visited Oct. 9, 2015).

128. *See Supermarket Sweep: The cold wind of competition sweeps the legal services market,* ECONOMIST, Apr. 27, 2013, at 54.

129. *See* Interview 10, *supra* note 47.

130. *Id.*; THE CO-OPERATIVE. GRP., ANNUAL REPORT 19 (2014), http://www.co-operative.coop/Corporate/PDFs/Annual-Report/2014/Co-operative-Group-Annual-Report-2014.pdf [http://perma.cc/NGZ9-5NHH] [hereinafter THE CO-OPERATIVE GRP.].

131. THE CO-OPERATIVE. GRP., *supra* note 130, at 19.

132. Interview 10, *supra* note 47; THE CO-OPERATIVE. GRP., *supra* note 130, at 16–17.

133. THE CO-OPERATIVE. GRP., *supra* note 130, at 19.

134. Interview 10, *supra* note 47.

legal services as they are interested in offering a "social good" both to their members and the community at large.[135] Several of the senior lawyers who helped build Co-operative Legal Services joined from the social welfare sector of the legal profession when steep cuts in legal aid were announced in the early 2010s.[136] They came in part because they saw the Co-operative as a viable platform to provide low cost legal services through a trusted brand to not only the middle class, but also to low income populations who no longer had access to legal aid.[137]

This sense of social mission is particularly true in regard to family law. While legal aid had previously been available to those who were income eligible in most private family law matters, including divorce and custody battles, after the cuts in April 2013 legal aid was only available in private family law disputes involving domestic abuse, forced marriage, or child abduction.[138] Within this reduced ambit, Co-operative Legal Services was the largest provider of family legal aid in the UK in 2014, having won seventy-eight government contracts across the country.[139] They serviced these contracts with peripatetic teams of lawyers that share office space in twenty-three of the Co-operative's bank branches.[140] They also have one of three national telephone contracts for family legal aid.[141] Beyond these government contracts, the Co-operative provides family legal services to the public at fixed rates. Some have expressed hope that the Co-operative will be able to provide these services at low enough prices so as to meaningfully mitigate access needs created by legal aid cuts.[142]

However, although the Co-operative is one of the largest providers of family law services, it has not been able to halt a massive increase in the number of unrepresented litigants in UK family courts as a result of legal aid cuts that took effect in 2013. Between 2011 and the first half of 2014 the percent of private family law disputes where neither party was represented by a lawyer more than doubled, and the percent of cases where both parties were represented by a lawyer dropped from forty-nine percent to 25.8 percent.

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135. *Id.*; *Co-Operative Group Values and Principles*, CO-OPERATIVE. GRP., http://www.co-operative.coop/corporate/aboutus/The-Co-operative-Group-Values-and-Principles/ [http://perma.cc/J3LJ-PRNF] (last visited Oct. 9, 2015) (noting "social responsibility" and "concern for the community" as core values and principles).

136. *See Interview* 10, *supra* note 47.

137. *Id.*

138. *Q&A: Legal Aid Changes*, BBC NEWS (March 20, 2013), http://www.bbc.com/news/uk-21668005 [http://perma.cc/4JQ2-77AP].

139. Interview 10, *supra* note 47.

140. *Id*.

141. *Co-operative Launches 'Massive Expansion' of Family Legal Aid Service*, SOLIC. J., (April 23, 2013), http://www.solicitorsjournal.com/news/management/business-development/co-op-launches-%E2%80%98massive-expansion%E2%80%99-family-legal-aid-service [http://perma.cc/RPS3-5RWZ].

142. Interview 10, *supra* note 47.

TABLE 3:
PERCENT OF PARTIES WITH LEGAL REPRESENTATION IN PRIVATE FAMILY LAW DISPUTES IN THE UK.[143]

	Both Parties	Applicant Only	Respondent Only	Neither Party
2011	49.0	29.9	10.0	11.1
2012	46.1	31.4	10.3	12.2
2013	35.0	37.4	9.3	18.3
2014 (1st half)	25.8	37.4	9.7	27.1

Just because new ABSs like Co-operative Legal Services have not been able to fill the gap created by reductions in legal aid, does not mean they have not helped mitigate the impact of these cuts or that they will not play a larger role in the future.[144] However, in recent years, by far the predominant driver of changes in access to representation in family law disputes in the United Kingdom is not the rise of ABSs like Co-operative Legal Services, but cuts in legal aid. Much like in personal injury, the emergence of ABSs in family law representation seems at best a sideshow with unclear effects in the larger access story.

B. AUSTRALIA

Like in the United Kingdom, Australia's competition authority (which enforces anti-competition law in the country) played a key role in advocating for the adoption of non-lawyer ownership in the country.[145] Under this pressure, and with little input from regulators or the bar, in the early 2000's the New South

143. This data is taken from U.K. MINISTRY JUST. COURT STATISTICS (QUARTERLY): APRIL TO JUNE MAIN TABLES, tbl 2.4 (2014), https://www.gov.uk/government/statistics/court-statistics-quarterly-april-to-june-2014 [https://perma.cc/3KMD-S8W5]. The number of private law family disputes also began to decline in 2014 (down fourteen percent from 2013), perhaps indicating that a lack of representation is deterring people from still seeking remedies in court. *Id.*

144. The number of respondents who reported that the family law services they received in the past two years represented value for money increased from fifty-seven percent to sixty-three percent between 2011 and 2014. There was also an increase of fixed fees in the family legal services market from twelve percent to forty-five percent. LEGAL SERVICES CONSUMER PANEL, TRACKER SURVEY 3 (2014) (U.K.), http://www.legalservicesconsumerpanel.org.uk/ourwork/CWI/documents/2014%20Tracker%20Briefing%201_Changing market.pdf [http://perma.cc/TE6H-GU7C].

The entry of ABSs into the market may have helped spur these changes. However, these changes may have also been caused by an increasingly competitive market in the run up to legal aid cuts. ABSs, including Co-operative, are reported to have only about five percent of the family legal services market so, while it is possible that they have spurred some of these changes, it seems unlikely that they are solely responsible. *Supra* tbl. 2.

145. *See* Georgina Cowdroy & Steven Mark, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 673–75 (2004).

Wales government adopted a set of reforms that allowed for Incorporated Legal Practices (ILPs) and Multi-Disciplinary Partnerships (MDPs).[146] ILPs and MDPs are corporations and partnerships respectively that can offer legal services, along with almost any other non-legal service,[147] and are allowed unlimited non-lawyer investment.[148] Other Australian states undertook similar reforms around the same time.[149]

Each ILP or MDP has a designated legal practitioner director or partner, who manages the firm's legal services and ensures compliance with professional obligations.[150] The firms must also create and implement their own "appropriate management systems" to ensure compliance with professional rules.[151] However, unlike ABSs in England and Wales, ILPs and MDPs in Australia do not have to be licensed by a legal regulator.[152] The Supreme Court may disqualify them though for violating certain conduct rules.[153] In other words, it is a registration, not a licensing, process.

While the United Kingdom has seen significant outside investment since allowing for non-lawyer ownership, the impact of similar reforms on the relatively small Australian legal services market has been more subdued. ILPs, and to a lesser extent MDPs, have become quite common in the Australian legal scene, but actual outside ownership outside a small handful of prominent examples is still rare. Instead these forms are largely adopted because of perceived tax and succession benefits.[154] Indeed, the large majority of ILPs are solo practitioners and most other ILPs are organized along the lines of traditional law firms.[155]

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146. *Id.*; *Legal Profession Amendment Act 2000* (NSW) (Austl.); *id*. at pt. 2.6. For a short history of when states allowed for incorporation of legal practices, see Parker, *supra* note 10, at 5–6.

147. *Legal Profession Act 2004* (NSW) s 135(1) (Austl.). An ILP may not conduct a managed investment scheme. *Id*. at s 135(2).

148. *Practice Structures,* THE LAW SOCIETY OF NEW SOUTH WALES, http://www.lawsociety.com.au/ForSolictors/practisinglawinnsw/practicestructures/index.htm [http://perma.cc/84PM-D84B?type=live] (last visited Oct. 7, 2015) (stating that any corporation may become an ILP, including therefore those owned by non-lawyers).

149. Only the state of South Australia still bars non-lawyer ownership in legal services. *Alternative Business Structures: Lessons From Other Jurisdictions*, GAZETTE 5 (Fall 2012), http://lawsocietygazette.ca/wp-content/uploads/2013/01/gazette-2012-03-fall.pdf [https://perma.cc/6Q2Q-XF87?type=source].

150. *Legal Profession Act 2004* (NSW) ss 140, 169 (Austl.).

151. *Id.* at § 140; Sheehy, *supra* note 55, at 16–18.

152. Sheehy, *supra* note 55, at 16.

153. *Legal Profession Act 2004* (NSW) s 153 (Austl.).

154. Parker, *supra* note 10, at 12 (ILPs are taxed at the corporate tax rate and it is arguably easier to transfer shares of an ILP to younger colleagues than in a traditional partnership).

155. *See, e.g.*, VICTORIA LEGAL SERV. BOARD & COMMISSIONER ANN. REP. 58 (2013), http://lsbc.vic.gov.au/documents/Report-Legal_Services_Board_and_Commissioner_annual_report-2013.pdf [https://perma.cc/YK96-A8UL?type=source] (In the state of Victoria there were 921 ILPs in 2013 of which 715 were solo practitioners). In New South Wales, as of 2014, there were just eighty-five ILPs with ten or more lawyers. Email 20 (Mar. 25, 2014) (on file with the author). From the websites of these firms none were offering fundamentally

1. PERSONAL INJURY AND CLASS ACTION: THE STORY OF THREE LAW FIRMS

Although there has not been a rush of non-lawyer owners into the legal services market in Australia, three law firms, including two personal injury firms, have now listed on the Australian Securities Exchange.[156] The two listed personal injury firms—Slater & Gordon and Shine Lawyers—are two of the three largest personal injury law firms in the country.[157] The other large personal injury law firm, Maurice Blackburn, has not gone public and continues to be lawyer owned. A comparison of these three personal injury law firms suggests that while publicly listing in the Australian context may not create readily apparent new conflicts of interest, it could more subtly undermine the public-spirited ideals of these firms. Such a comparison also casts doubt on whether outside ownership is necessary to achieve large economies of scale or whether such size in the end improves access to legal services.

In 2013, the personal injury market in Australia was estimated at somewhere between $550 and $700 million (AUD).[158] Contingency fees are not allowed in Australia,[159] but states have varied types of conditional fee arrangements. For example, Victoria and Queensland allow for a twenty-five percent increase to a winning solicitor's hourly fees, but New South Wales does not allow for a similar "uplift" upon winning.[160] Firms with deep pockets are better placed to offer conditional no win no fee arrangements, while tort reform in the early 2000s that included restrictions on the type of advertising allowed in personal injury has tended to favor established brands.[161] This environment has helped lead to consolidation in the personal injury market, and as of 2013 the three largest players were Slater & Gordon (with twenty to twenty-five percent of the market), Maurice Blackburn (with just over ten percent), and Shine Lawyers (with almost

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different services than traditional law firms although two, Slater & Gordon and Shine Lawyers, were publicly owned companies.

156. Slater & Gordon Limited (SGH) (listed May 21, 2007), ASX, http://www.asx.com.au/asx/research/company.do#!/SGH [perma.cc/Q73K-GDNK](last visited Dec. 23, 2015); ILH Group Limited (ILH) (listed Aug. 17, 2007), ASX, http://www.asx.com.au/asx/research/company.do#!/ILH [perma.cc/FH83-FQKZ] (last visited Dec. 23, 2015); Shine Corporate Ltd (SHJ) (listed May 15, 2013), ASX, http://www.asx.com.au/asx/research/company.do#!/SHJ [perma.cc/PVS8-QFJQ] (last visited Dec. 23, 2015).

157. SLATER & GORDON ANNUAL REPORT 2014, SLATER & GORDON 9 (2014), https://media.slatergordon.com.au/annual-report-2014.pdf [https://perma.cc/WP3J-R37T] [hereinafter SLATER ANNUAL REPORT].

158. *Id*.

159. MAURICE BLACKBURN LAWYERS, RESPONSE TO THE ACCESS TO JUST. ARRANGEMENTS ISSUE PAPER 3, 4 (Aug. 7, 2013), http://www.pc.gov.au/__data/assets/pdf_file/0007/129337/sub059-access-justice.pdf [http://perma.cc/NE8F-GZZ4].

160. *Id*. at 4. The lack of allowed "uplift" has led firms to complain that in New South Wales they cannot offer legal services for cases they would be able to represent in other states.

161. SHINE PROSPECTUS, *supra* note 60, at 10 ("Tort reform also presents opportunities, particularly in the acquisition of smaller practices which do not have the systems in place to deal with complex regulatory changes.").

ten percent).[162]

Slater & Gordon, founded in Melbourne in 1935, was already a well-known personal injury law firm when it was the first law firm to list on a stock exchange in Australia in 2007.[163] At that time it had 400 staff in fifteen offices,[164] revenues of $55 million a year,[165] and an estimated ten percent of the personal injury market.[166] However, partly through a series of acquisitions,[167] by 2014 it had expanded to have revenue of $234 million in Australia and employed 1,200 people in seventy locations across the country, in addition to having extensive operations in the UK.[168] It spends heavily on advertising and in 2014 had about seventy-five percent brand awareness across Australia.[169] Slater & Gordon is now also the largest provider of family law services, with plans to expand to become a general all-purpose consumer law firm.[170]

While Slater & Gordon has been able to grow rapidly since it went public, it was already expanding before it listed.[171] Similarly, Shine Lawyers already had offices across the country and had grown markedly before it went public in 2013.[172] Maurice Blackburn, the second largest personal injury firm in the country, is not publicly owned. From 2005 to 2013 it expanded at a similar rate to Slater to twenty-seven offices and 800 staff.[173] However, most of this growth was internal and it may be that publicly owned firms are at an advantage in acquiring other law firms since they can often offer generous equity packages to incoming partners.

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162. SHINE PROSPECTUS, *supra* note 60, at 10 (estimating Shine had no more than 10 percent of the personal injury market); SLATER ANNUAL REPORT, supra note 157, at 9 (estimating Slater had twenty-five percent of the personal injury market); Telephone Interview 16 (June 11, 2014) (noting Maurice Blackburn has a slightly larger share of the personal injury market than Shine) [hereinafter Interview 16].

163. SLATER & GORDON, PROSPECTUS 10 (2007), https://media.slatergordon.com.au/prospectus.pdf [http://perma.cc/B7JE-4HR5] [hereinafter SLATER PROSPECTUS].

164. *Id*.

165. *Id.*, at 10. According to its management team, Slater pursued a public listing rather than private equity because it provided more money, was easier for mergers, and allowed for better management systems. Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535, 536–537 (2009).

166. SLATER PROSPECTUS, *supra* note 163, at 23.

167. For an overview of these acquisitions, see Our History, Slater & Gordon, [perma.cc/E4JR-LQC6] (last visited Dec. 19, 2015).

168. SLATER & GORDON, ANNUAL REPORT 2 (2014).

169. *Id*. at 11. In 2004 (before Slater went public) a survey found that the firm had sixty percent national brand awareness. SLATER PROSPECTUS, *supra* note 163, at 24.

170. Chris Merit, *Slater & Gordon's Three-Part Plan Comes Together*, THE AUSTRALIAN (Nov. 1, 2013), http://www.theaustralian.com.au/business/legal-affairs/slater-gordons-three-part-plan-comes-together/story-e6frg97x-1226750779555?nk=cfce80ad96b8b743ccae5984fd1d6c42 [http://perma.cc/E35K-T8WN].

171. SLATER PROSPECTUS, *supra* note 163, at 10.

172. Interview 16, *supra* note 162; SHINE PROSPECTUS, *supra* note 60, at 8–9, 14–15.

173. MAURICE BLACKBURN LAWYERS, RESPONSE TO ACCESS TO JUSTICE ARRANGEMENTS ISSUES PAPER 1 (Nov. 2013), http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub059-access-justice.pdf [http://perma.cc/V7LG-L6R4] [hereinafter MAURICE BLACKBURN RESPONSE].

Some scholars have claimed that access to investor capital allows firms like Slater & Gordon to achieve a large enough size so that it can engage in more pro bono work and fund riskier class actions that may further the public interest.[174] It is unclear though whether investor capital is necessary for either of these aims and it may even undermine them. Both Shine Lawyers, which only listed recently, and Maurice Blackburn, which is not publicly listed, are better known for their pro bono work than Slater & Gordon.[175] Meanwhile, Maurice Blackburn and Slater & Gordon are by far the two largest law firms for plaintiff class action work in the country with Maurice Blackburn claiming to be the largest.[176] Third party litigation funders (who are able to charge contingency fees in Australia, unlike solicitors) finance a large percent of the class actions of both these firms.[177] These third party litigation funders favor securities class actions and are less likely to fund consumer and product liability class actions, which must instead be funded directly by the law firms themselves.[178] Slater & Gordon may actually be less likely than Maurice Blackburn to directly take on the costs of these class actions because it must answer to the market, instead of the firm's partners.[179] For example, when Slater & Gordon lost a major consumer drug class action in 2012, it led to a 10.5 percent profit loss for the firm that year.[180] This very public defeat led its chairman to reassure the market that most of the rest of its class action portfolio was funded by third-party litigation funders.[181]

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174. Sheehy, *supra* note 55, at 24 ("With its increased financial power supplemented by the litigation funders, Slater has been able to prosecute actions against large MNCs more effectively.").

175. Interview 15, in Cambridge, Mass. (Apr. 18, 2014); Interview 16, *supra* note 162 (Independent observers of the Australian market both noting that Maurice Blackburn and Shine Lawyers had stronger reputations for pro bono work than Slater & Gordon).

176. MAURICE BLACKBURN RESPONSE, *supra* note 173, at 17; VINCE MORABITO, AN EMPIRICAL STUDY OF AUST.'S CLASS ACTION REGIMES FIRST REP. 28 (2009), http://globalclassactions.stanford.edu/sites/default/files/documents/Australia_Empirical_Morabito_2009_Dec.pdf [http://perma.cc/D3BR-TPMG] (finding that Slater & Gordon (forty-nine proceedings) and Maurice Blackburn (thirty-three proceedings) were involved in the most class action proceedings between 1993 and 2009).

177. For an overview of the reasons behind the development of litigation funders in Australia, see generally Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014).

178. Interview 16, *supra* note 162 (academic expert on class actions noting that third party litigation funders are more likely to fund corporate class actions)*; see also* Samuel Issacharoff & Thad Eagles*, The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions*, 38 U.N.S.W. L. J. 179, 180 ("The system of third party funders is simply ill-suited to consumer class actions, given the vast number of people who have been harmed and with whom funders would need to contract, and to bringing meritorious claims with thinner profit margins than third party funders find acceptable.").

179. Interview 16, *supra* note 162 (arguing that since Slater is a public company it is less likely to take on riskier cases).

180. Stephanie Quine, *Failed Vioxx Action Hits Slaters' Profit*, LAW. WKLY (Aug. 28, 2012), http://www.lawyersweekly.com.au/news/failed-vioxx-action-hits-slater-profit [http://perma.cc/8GCQ-LNCH].

181. *Id*. (Slater & Gordon's managing director Andrew Grech reportedly stated that though it was "very disappointing, I think the important thing to emphasize is it's very much a once-off situation and certainly not indicative of what's in the portfolio of cases we have in the future, most of which, in the class action area, are funded by third party litigation funders now.").

Indeed, critics of non-lawyer ownership in Australia argue that publicly listing orients the culture of a firm towards investors' expectations. The chairman of Maurice Blackburn has announced his firm's intention to stay privately owned, claiming that it does not " . . . want to compromise the quality of [its] work . . . . If you are a publicly listed company, then you will have to grow according to market forecast[s]."[182] To meet these projections, some maintain that publicly listed firms do not take on riskier cases (such as large consumer class actions), shun pro bono (particularly controversial cases), and may even pressure their lawyers to settle cases to meet fiscal targets (although such claims have not been proven).[183]

Even though the listing of law firms in Australia has not created the same types of clear conflicts of interest as other types of non-lawyer ownership in the UK, such as insurance companies owning personal injury firms,[184] the Australian experience does suggest that listing publicly could undermine some of the public-spiritedness of these firms. This could reduce access for certain groups that would benefit from pro bono or certain kinds of class actions. The rapid growth of Maurice Blackburn and Shine Lawyers (before it went public) should also lead one to question whether non-lawyer ownership is necessary to achieve large economies of scale, even if it may give these firms a competitive advantage in acquiring other firms. Finally, some have expressed concern that non-lawyer ownership has led to an unhealthy consolidation of the Australian personal injury market leading to a decrease in choice for consumers without necessarily improving the quality of services or making them less expensive.[185]

C. UNITED STATES

Non-lawyer ownership of legal services is banned in all fifty U.S. states, although Washington D.C. allows for minority non-lawyer ownership, mostly to accommodate law firms with partners who are non-lawyer lobbyists.[186] In the face of perceived competition from accounting firms, the American Bar Association (ABA) seriously considered allowing for multi-disciplinary practice, which included non-lawyer ownership, in the late 1990s, but this was rejected amidst deep resistance from the bar whose suspicions about its dangers were

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182. Jessica Seah, *Slater & Gordon Goes Global*, ASIAN LAW. (May 27, 2013), http://practicesource.com/asian-lawyer-website-publishes-feature-slater-gordon/ [http://perma.cc/3RD5-DUUC] (quoting Maurice Blackburn chairman Steve Walsh).

183. Interview 27 (Aug. 17, 2014).

184. *See* COMP. RECOVERY UNIT DATA, supra note 121.

185. Cristin Schmitz, *PI Bar Warns of Fallout if ABS Comes*, THE LAW. WKLY, Aug. 29, 2014 (quoting Charles Gluckstein commenting on how he thinks Australia has become a "monopoly [personal injury] market").

186. Catherine Ho, *Can Someone Who is Not a Lawyer Own Part of a Law Firm? In D.C., Yes*, WASH. POST (Apr. 8, 2012), http://www.washingtonpost.com/business/capitalbusiness/can-someone-who-is-not-a-lawyer-own-part-of-a-law-firm-in-dc-yes/2012/04/06/gIQAnrvd4S_story.html [http://perma.cc/2SVD-4ZER].

heightened in the wake of the Enron scandal.[187] In 2012, the ABA's Commission on Ethics declined to develop a proposal that would have allowed for limited non-lawyer ownership[188] and the same year a task force of the New York State Bar considered and rejected recommending non-lawyer ownership.[189]

Unlike its counterparts in the United Kingdom and Australia, the U.S.'s competition body, the Federal Trade Commission (FTC), has not been active in pushing for non-lawyer ownership, in part because of barriers created by U.S. federalism.[190] Jacoby & Meyers, a large branded personal injury and consumer law firm,[191] has brought litigation in federal court in New York claiming that the ban on non-lawyer ownership is unconstitutional and limits access to the civil legal system.[192] The firm argues that it does not have access to capital like its non-lawyer owned competitors, such as LegalZoom, that are able to invest heavily in technology and advertising.[193] Jacoby & Meyers asserts that the lawsuit is "to free itself of the shackles that currently encumber its ability to raise outside funding and to ensure American law firms are able to compete on a global

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187. The proposal for multi-disciplinary practice in the United States considered in the late 1990s and early 2000s would have allowed for non-lawyer partners, but not passive investment. Laurel S. Terry, *The Work of the ABA Commission on Multi-Disciplinary Practice*, *in* MULTI-DISCIPLINARY PRACTICES & PARTNERSHIPS: LAW., CONSULTANTS & CLIENTS 2-1, 2-19 (Stephen J. McGarry ed., 2002), http://www.personal.psu.edu/faculty/l/s/lst3/McGarry%20Mutlidisciplinary%20Ch2.PDF [http://perma.cc/JNU2-VFVC] (describing process and debates surrounding the ABA's consideration of multi-disciplinary practice). For further reading, see generally Commission on Multi-Disciplinary Practice, ABA, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html [http://perma.cc/QK2N-XL7N] (providing links to ABA reports, debates, and resolutions on multi-disciplinary practice).

188. James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, ABA J. (June 1, 2012), http://www.abajournal.com/magazine/article/summer_job_ethics_20_20_commission_shelves_nonlawyer_ownership/ [http://perma.cc/2QX7-PTW4].

189. NYSBA REPORT, *supra* note 8, at 6, 69–79.

190. The Supreme Court has held that the Sherman Act does not apply to "state action." Parker v. Brown, 317 U.S. 341, 350–52 (1943). This theoretically allows private business actors to pressure state actors to restrict competition, i.e. by influencing a state to implement market restraints that the state "clearly articulates and affirmatively expresses" and "actively supervises." Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1978) (citing City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (plurality opinion)).

191. Jacoby & Meyers was well known as one of the major "franchise law firms" that some thought would transform the U.S. legal services in the 1980s and 1990s because of their national brand and economies of scale. *See, e.g.*, Carroll Seron, *Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 63, 68 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992); JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 4–5 (1997).

192. Complaint for Declaratory and Injunctive Relief, Jacoby & Meyers L. Offices vs. Presiding Justices of the First, Second, Third, and Fourth Departments, Appellate Division of the S. Ct. of the State of N.Y., 2, 4 (S.D.N.Y. May 18, 2011), http://online.wsj.com/public/resources/documents/JacobyMeyerssuit.pdf [http://perma.cc/44LY-2AEY]. A New York district judge initially dismissed the suit, but a circuit court later reinstated it in district court in 2013. David Glovin & Don Jeffrey, *Jacoby & Meyers Wins Round in Nonlawyer Investor Dispute*, BLOOMBERG (Jan. 9, 2013), http://www.bloomberg.com/news/2013-01-09/jacoby-meyers-wins-round-in-nonlawyer-investor-dispute.html [http://perma.cc/2XKQ-2HPT].

193. Interview 11, in Cambridge, Mass. (Feb. 7, 2014).

stage."[194]

While non-lawyer ownership of legal services per se is barred, this section examines two examples of sectors in the U.S. that provide close parallels: online legal services (in particular legal services provided by the company LegalZoom) and social security disability representation (in particular services provided by the company Binder & Binder).

1. ONLINE LEGAL SERVICES AND LEGALZOOM

LegalZoom is an online legal services company that provides an example of a non-lawyer owned company that has innovated in the legal services market, invested heavily in technology and advertising, and achieved large economies of scale.[195] However, it is unclear how much it, and other companies like it, has increased access to legal services for poor and moderate-income populations. It has also been able to achieve its growth in a regulatory environment that bars non-lawyer ownership, while similar online legal service companies have not developed in either the UK or Australia, although LegalZoom could potentially offer a superior service if the ban on non-lawyer ownership was lifted.

LegalZoom was founded in 2001 by a small group of law graduates based in California.[196] In 2011, LegalZoom's customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using their online legal platform.[197] As of 2014, LegalZoom had over 800 staff, more than $200 million in revenue, and offered legal plans in forty-two U.S. states.[198] Today its management team is made up mostly of non-lawyers and the company has a number of private equity investors.[199]

LegalZoom provides legal services mainly to small businesses and individuals. They offer flat fee rates for self-guided legal documentation services such as registering a company or creating a will. They also provide legal plans for their customers at set rates. For example, in 2014 they charged fifteen dollars a month for an individual to speak with an attorney regarding "estate planning, contracts

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194. Glovin & Jeffrey, *supra* note 192.

195. For example, in 2011, LegalZoom had about $150 million in operating expenses of which sales and marketing was $42 million and technology development $8.1 million. LegalZoom.com, Inc. (Form S-1) (May 10, 2012), http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm [http://perma.cc/7EVY-QRQJ] [hereinafter LegalZoom SEC filing]. It provides equity-based compensation to its management team as well as key employees in marketing and technology development. *Id*. at 39.

196. Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011), http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html [http://perma.cc/LXY2-56W9].

197. LegalZoom SEC filing, *supra* note 195, at 36.

198. Telephone Interview 14 (Apr. 15, 2014) [hereinafter Interview 14].

199. In 2014 the European based private equity firm Permira invested $200 million in LegalZoom, giving Permira the ability to appoint a majority of the board. *Permira Funds Complete Acquisition of More than $200 Million of LegalZoom Equity*, LEGALZOOM (Feb. 14, 2014), https://www.legalzoom.com/press/press-releases/permira-funds-complete-acquisition-of-more-than-200-million-of-legalzoom-equity [http://perma.cc/9G6X-DE9X].

and other new legal matters."[200] While LegalZoom has its own lawyers on staff that develop the guided forms that their customers use to create customized legal documents, the company contracts with third party panel law firms to service their legal plan customers.[201] These panel law firms have dedicated lawyers that work with LegalZoom customers over the phone and online. The lawyers in these firms, not LegalZoom, are liable for their advice and the partner of the contracted firm is responsible for selecting, training, and supervising the attorney that services LegalZoom customers.[202] After each customer interaction, LegalZoom surveys customers on their experience with their lawyer.[203] Since customers are not necessarily well positioned to determine the quality of the legal advice they receive, LegalZoom also hires a third party law firm to "secret shop," or pretend to be customers, by calling LegalZoom affiliated lawyers with mock legal problems.[204] Based on input from these sources, LegalZoom then analyzes a lawyer's work and discusses their performance with contracted law firms.[205]

LegalZoom has confronted legal challenges to its business model. Litigants have claimed since non-lawyers own equity stakes in the company it is legally barred from offering legal services and so its services amount to the unauthorized practice of law. At the bottom of its homepage LegalZoom has a disclaimer that reads in part:

> LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.[206]

In its terms of use listed elsewhere on the website it makes clear that "claims arising out of or relating to any aspect of the relationship between us" will be resolved through binding arbitration.[207] It also details that "Any arbitration under these Terms will take place on an individual basis; class arbitrations and class actions are not permitted."[208]

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200. *Last Will and Testament Pricing*, LEGAL ZOOM, http://www.legalzoom.com/legal-wills/wills-pricing.html [http://perma.cc/8KZH-Q22P] (last visited Oct. 17, 2015).

201. Interview 14, *supra* note 198.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*.

206. LEGALZOOM, http://legalzoom.com [http://perma.cc/7332-SA3N] (last visited Sept. 11, 2015).

207. *Terms of Use*, LEGALZOOM, https://www.legalzoom.com/legal/general-terms/terms-of-use [http://perma.cc/8S95-VB25] (last visited Sept. 11, 2015).

208. *Id*.

LegalZoom has so far either won or settled legal challenges that claimed their services amount to the unauthorized practice of law.[209] Importantly, relying on recent U.S. Supreme Court jurisprudence, the Arkansas Supreme Court in *LegalZoom.com v. Jonathan McIllwain*[210] found that LegalZoom's arbitration clause, including its bar on class actions, was enforceable.[211] Without the economic incentives of a class action at the disposal of plaintiffs (and their lawyers), fewer litigants will likely bring claims against LegalZoom in the future and even where they do, if they are successful, their victories will be more limited.[212] As LegalZoom, and companies like it, continue to expand, and more customers rely on them, it will also become increasingly impractical for a court–or perhaps even a legislature–to bar their business model.

If the ban on non-lawyer ownership were lifted LegalZoom would not only face fewer litigation challenges, but it would not have to rely on partnerships with outside lawyers and could hire lawyers to directly provide services to its customers. This would increase the company's control over the lawyers that service its customers, potentially allowing the company to provide a better service at a lower price.

Still, the impact of LegalZoom and companies like it so far on access to legal services is not well documented. Anecdotally, they have put pressure on prices and so likely increased access.[213] Yet, a company like LegalZoom is aimed primarily at small businesses and the upper middle class.[214] In other words, people with the capacity to know they have a legal problem and the resources and savviness to be able to seek out its answer on the Internet and pay for it.

Will-writing provides an example of both how difficult it is to assess the access impact of companies like LegalZoom and a reason to believe it might be limited. Many people, even with minimal assets, could benefit from having a will (or at

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209. Interview 14, *supra* note 198; Terry Carter, *LegalZoom Business Model OK'ed by South Carolina Supreme Court*, ABA JOURNAL (Apr. 25, 2014), http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court/ [http://perma.cc/9R7Z-FCQX].

210. LegalZoom.com v. Jonathan McIllwain, 429 S.W.3d 261, 261 (Ark. 2013).

211. The Arkansas Court relied heavily on the US Supreme Court's decisions in Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006) and AT&T Mobility v. Concepcion, 563 U.S. 333 (2011). In *Cardegna* the U.S. Supreme Court held that under the Federal Arbitration Act (FAA) the legality of an arbitration clause could only be decided by an arbitrator unless the clause itself was challenged (such as if the contract had been entered into through fraud). In *AT&T*, the U.S. Supreme Court found that the FAA preempted state laws that banned contracts that prohibited class-wide arbitration. The Arkansas Supreme Court held that this line of U.S. Supreme Court jurisprudence barred the state's courts from hearing the plaintiff's challenge, but did refer the case to its Committee on the Unauthorized Practice of Law. In American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), the U.S. Supreme Court continued this line of precedent further, finding in a five to three decision that under the FAA a court is not permitted to invalidate a contractual waiver of class arbitration on the reasoning that the cost of an individual plaintiff of arbitrating a federal statutory claim exceeds the potential recovery.

212. *But see* Terry Carter, *LegalZoom Hits a Legal Hurdle in North Carolina*, ABA JOURNAL (May 19, 2014), http://www.abajournal.com/news/article/legalzoom_hits_a_hurdle_in_north_carolina [http://perma.cc/T782-N75C] (last visited Oct. 17, 2015) (noting a North Carolina judge extending the life of a case by North Carolina bar claiming LegalZoom's services amount to the unauthorized practice of law).

213. Interview 14, *supra* note 198.

214. *Id.*

least their family or heirs would). One might hypothesize that the proliferation of websites that offer will-writing services like LegalZoom would increase the number of people with wills both through driving down prices and raising awareness of the need for a will through advertising.[215] However, a periodic Harris Interactive survey has found that the number of Americans with wills has remained relatively unchanged in the past decade.[216] According to the survey, it was forty-two percent in 2004, forty-five percent in 2007, thirty-five percent in 2009, and forty-three percent in 2011.[217] Data from probate courts in at least one state seems to back up this conclusion. In 2002 about thirty-two percent of cases filed in Massachusetts' probate court involved deceased who had no will.[218] Slightly over ten years later in 2011 this rate was essentially unchanged at thirty-one percent.[219]

While the survey and Massachusetts probate court data indicate there has been little movement in the number of people without wills this does not mean that

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215. Others prominent online legal service companies that offer will-writing services for the U.S. market include rocketlawyer.com and nolo.com.

216. *Lawyers.com Survey Reveals Drop in Estate Planning*, LAWYERS.COM (Feb. 25, 2010), http://press-room.lawyers.com/2010-will-survey-press-release.html [http://perma.cc/YT67-JUAH] [hereinafter *Lawyers.com Survey Reveals Drop*] (last visited Oct. 17, 2015); Jenny Greenhough, *57% of Americans Don't Have a Will—Are You One of Them? Estate Planning Results Announced*, EVERYDAY LAW BLOG, (Mar. 31, 2011), http://blog.rocketlawyer.com/2011-wills-estate-planning-survey-95235 [http://perma.cc/Q5ZX-BW8K].

217. *Lawyers.com Survey Reveals Drop*, *supra* note 216.

218. Importantly, while the survey data does not tell us what number of Americans should have a will, the probate court data is more suggestive. Since the deceased's heirs went to probate court these were instances where the deceased did have some property, that they had not undertaken other forms of estate planning (or these were insufficient), and so they may have benefitted from having a will. As the below table shows, in Massachusetts there has been little change in the number of cases filed in probate court where the deceased had no will between June 30, 2002 and June 30, 2011. (Note: data for 2008 and 2010 was not available. After 2011 Massachusetts no longer tracked whether there was a will in a probate filing). Interview 14, *supra* note 198.

TABLE 4:
NUMBER OF PROBATE FILINGS INCLUDING WILLS.

	2002	2003	2004	2005	2006	2007	2009	2011
No. of Probate Filings	19552	21420	22152	21979	21384	21244	20322	20645
Filings with Will	13279	14488	14800	14756	14264	14345	13758	14226
Filings without Will	6273	6932	7352	7223	7120	6899	6564	6419
% of Filings without Will	32.1	32.4	33.2	32.9	33.3	32.5	32.3	31.1

219. *Id.*

companies like LegalZoom have had no positive access benefits. Perhaps without LegalZoom and companies like it the number of people with wills in Massachusetts or elsewhere would have decreased significantly and instead the number has remained relatively steady.[220] However, the presence of such companies has not been able to significantly increase the number of people with wills, nor is the quality of LegalZoom's wills compared to wills drafted by more traditional law firms well documented.[221] Overall, it is unclear what impact a company like LegalZoom has on access to legal services, and how dependent their strategy is to jurisdictions adopting non-lawyer ownership in the first place.

2. SOCIAL SECURITY DISABILITY REPRESENTATION AND BINDER & BINDER

In 2014, about 8.4 million Americans received Social Security Disability assistance.[222] When applying for this assistance, claimants can represent themselves or be represented by an attorney or a registered non-attorney representative. Disability representatives, whether they are attorneys or non-attorneys, frequently act on a contingency fee basis and are paid by the Social Security Administration (SSA) twenty-five percent of any back award owed to the claimant, up to $6,000.[223] In 2013, the SSA paid out about $1.2 billion to these disability representatives.[224] Several disability representation services are non-lawyer owned. Non-lawyer owned representation services often rely on non-attorney representatives while law firms often rely on lawyers in representing claimants. Therefore, it is difficult to disentangle whether it is non-lawyer ownership or non-lawyer representation that is driving differences between firms. Still, the experiences of this sector provide another example of how non-lawyer ownership may allow some companies to scale, but not necessarily significantly increase access. Non-lawyer ownership in this sector may also amplify and formalize behavior that may undermine standards of professional practice.

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220. For instance, perhaps the rates of lawyers increased during this period and companies like LegalZoom were able to partially fill the resulting access gap. Alternatively, perhaps companies like LegalZoom have only been a replacement good for other affordable will-writing resources already available, like books on how to write your own will.

221. The available data also does not tell us about the quality of the wills LegalZoom helps it customers create. A survey of will-writing in the U.K. found that online self-completion wills were significantly more likely to be judged not to be legally valid or to fail to fulfill the client's wishes. IFF Research, *Understanding the Consumer Experience of Will-Writing Services* 56 (2011), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lsb_will_writing_report_final.pdf [http://perma.cc/5MR3-EXZ2].

222. SOCIAL SECURITY ADMINISTRATION, MONTHLY STATISTICAL SNAPSHOT JUNE 2014 (July 2014), http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ [http://perma.cc/H7WR-KRVE].

223. *GN 03940.003 Fee Agreement Evaluation*, SOCIAL SECURITY ADMINISTRATION, https://secure.ssa.gov/poms.nsf/lnx/0203940003#a3 [http://perma.cc/5TY9-M5MW] (last visited Sept. 11, 2015).

224. *Statistics to Title II Direct Payments to Claimant Representatives*, SOCIAL SECURITY ADMINISTRATION, http://www.ssa.gov/representation/statistics.htm#2013 [http://perma.cc/37KV-UJU3] (last visited Sept. 11, 2015).

Binder & Binder is one of the largest providers of social security disability representation in the United States.[225] Binder started as a law firm in 1975, but incorporated in 2005.[226] It is not public knowledge whether Binder started receiving non-lawyer investment in 2005, but in 2010 the venture capital firm H.I.G. reportedly bought a major stake in the company.[227] Binder's share of SSA payments to representatives increased from about 3.25 percent of the total in 2005 to six percent in 2010 (or approximately eighty-eight million dollars).[228]

Binder has been successful at expanding their customer base through investment in advertising and marketing, but the prevalence of contingency fees in disability representation means that most clients with strong claims probably could already find free representation even before Binder's growth. In expanding its volume of customers Binder may arguably reach more individuals with riskier, but valid, claims. On the other hand, Binder may provide lower quality representation, causing more lost claims than otherwise would occur, but because of their high turnover still win enough cases so that their business model is profitable. Indeed, some disability lawyers complain that Binder's streamlined emphasis on the bottom line has led to a deterioration of standards in the field that has "infected law firms" normalizing and nationalizing harmful practices, such as representatives not meeting clients until the day of their hearing.[229] Binder has also been subject to complaints accusing them of ethical violations, such as not sharing damaging evidence against their clients with the SSA as required by law.[230]

Despite these allegations, Binder likely engaged in some of its more controversial business practices before they had non-lawyer investors. Further, lawyer owned firms representing disability claimants have also been criticized for their questionable tactics.[231] In the end, non-lawyer ownership may have allowed a firm like Binder to more effectively spread their business model, but likely did not create the tactics that some claim have helped undercut professional norms in the sector.

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225. Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in Social Security Disability System*, WALL ST. J. (Dec. 22, 2011), http://online.wsj.com/news/articles/SB10001424052970203518404577096632862007046[http://perma.cc/HMP7-5V9E].

226. *Binder & Binder—The National Social Security Disability Advocates (NY),* N.Y. DEP'T OF ST. DIVISION OF INCORPORATIONS (Aug. 2014), https://appext20.dos.ny.gov/corp_public/ [http://perma.cc/FHB4-E67M].

227. Paletta & Searcey, *supra* note 225.

228. *Id*.

229. Telephone Interview 22 (Aug. 8, 2014) (practitioner noting that "Non-lawyers brought a different ethos that infected law firms . . . . It used to be unthinkable 20 years ago that you would go to a hearing and have never met the client before, but now it's not just Binder & Binder that does it but many lawyers").

230. *Id*.

231. *See* Paletta & Searcey, *supra* note 225; U.S. SENATE COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, HOW SOME LEGAL, MEDICAL, AND JUDICIAL PROFESSIONALS ABUSED SOCIAL SECURITY DISABILITY PROGRAMS FOR THE COUNTRY'S MOST VULNERABLE: A CASE STUDY OF THE CONN LAW FIRM (2013), http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=0d1ad28a-fd8a-4aca-93bd-c7bf9543af36 [http://perma.cc/4J2R-D3GP].

III. TOWARDS A FRESH UNDERSTANDING OF NON-LAWYER OWNERSHIP

Changes in ownership rules do not directly challenge lawyers' monopoly in providing legal services. However, they do help determine what type of commercial ecosystem lawyers are a part of and the degree to which the profession is integrated, or separated, from the rest of the market. Those who advocate for more integration by allowing non-lawyer ownership frequently argue this will lower prices and increase access and quality. Those who oppose greater integration worry it will undercut ethical and professional distinctiveness and create new conflicts. The country and case studies in this Article show that while both sets of claims have some merit, they also miss critical components of non-lawyer ownership's likely impact.

A. CONTEXT MATTERS: A TAXONOMY OF VARIABLES

The actual scale and form non-lawyer ownership takes is affected by variables that are often overlooked, or under-emphasized, in the non-lawyer ownership debate. These variables include the type of non-lawyer owner, the sector of legal services at issue, the regulatory environment surrounding non-lawyer ownership and the broader profession, and the nature of the legal services and capital markets in a jurisdiction. More fully taking into account these variables can help regulators better predict the likely impact of non-lawyer ownership in different contexts so they can better craft appropriate regulation.

1. OWNERSHIP VARIATION

Not all types of non-lawyer owners of legal services are the same. Legal service enterprises may be publicly listed, owned by private outside investors, worker owned, consumer owned, government owned, or owned by a company that also provides other goods or services. Each type of ownership creates different kinds of pressures on an enterprise offering legal services.[232] For example, a publicly listed firm like Slater & Gordon may be more likely to make decisions to satisfy the broader public investor, whether this means focusing on meeting projected targets or avoiding negative publicity.[233] Consumer owned firms, like the Co-Operative Legal Services in the United Kingdom, or non-profit owned firms may be better able to follow a social mission.[234] A company that also offers other services may be more likely to offer legal services geared towards increasing the bottom line of the core business of that company, potentially

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232. HANSMANN, *supra* note 23 (describing why different industries may be more amenable to certain types of owners in different country contexts).

233. *See supra* II.C.1.

234. *See supra* II.A.2; Salvos Legal in Australia is an example of a law firm owned by a non-profit, the Salvation Army, the profits of which then fund a legal aid firm. *See About Us*, SALVOS LEGAL, http://www.salvoslegal.com.au/about_us [http://perma.cc/J3A7-DRNU] (last visited Sept. 11, 2015).

creating more conflicts of interest.[235] Private equity investment may be particularly drawn to companies like LegalZoom that hold out the promise of technological or other innovations in legal services that could lead to large profits in the short to mid-term.[236] Recently in England and Wales municipal governments have started their own law firms to provide legal services to both themselves and other local governments and non-profits for a fee.[237] These new government owned enterprises could further the public interest by generating profits for the government exchequer or being able to better serve public clients, but they also may present the opportunity for new conflicts of interest and the introduction of an unwelcome commercial orientation into government lawyering. Which types of ownership of legal services come to predominate in the future will have an important impact on what types of conflicts of interest may develop, the public-spirited orientation of the profession, and non-lawyer ownership's ultimate impact on access.

2. LEGAL SECTOR VARIATION

Vitally, and under-appreciated in the non-lawyer ownership debate, certain sectors of legal services are more likely to witness much more non-lawyer ownership than others. In particular, non-lawyer investors seem more probable in areas of the law that are amenable to economies of scale and where other non-lawyer costs may be high (such as advertising, administration, or technology). In this way, the impact of non-lawyer ownership should be viewed differently depending on the sector of legal services at issue, with some sectors likely to be transformed–with potential access benefits and professionalism concerns–and others being only marginally affected.

Notably, in the United Kingdom and Australia the personal injury sector has seen a disproportionate amount of non-lawyer investment.[238] This investment may be because personal injury has historically had high advertising costs, large profits, and a relatively routine and high volume of cases that often result in settlement.[239] Meanwhile, areas like criminal law or immigration have seen

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235. For example, insurance companies entering the legal services market may be more likely to view legal services as a spin off from its core insurance business whose interests should remain paramount. *See supra* II.A.1 for such a possible instance in the United Kingdom.

236. Online legal service platforms like LegalZoom have witnessed private investment. *See supra* II.C.1; Binder & Binder has also seen private equity investment although it relies less on technology. *See supra* II.C.2.

237. John Hyde, *SRA Approves First Council ABS*, L. SOC.'Y GAZETTE (Aug. 6, 2014), http://www.lawgazette.co.uk/law/sra-approves-first-council-abs/5042566.article [http://perma.cc/444P-43R2] (last visited Oct. 11, 2015).

238. *See supra* II.A.1, II.B.1.

239. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 810 (2011) (describing how in the U.S. settlement mills use a disproportionate number of non-lawyers to settle routine personal injury matters).

much less non-lawyer ownership,[240] perhaps because clients seek more individualized attention and the relative skills of a particular lawyer may matter more to the outcome of a case.

3. VARIATION IN THE REGULATION OF THE LEGAL PROFESSION

The broader regulatory environment of legal services in a jurisdiction also shapes how non-lawyer ownership develops. In the UK, a new ban on referral fees, which insurance companies once counted as an important source of revenue, led them to buy their own affiliated personal injury law firms.[241] A ban on contingency fees in Australia, and conditional fees that vary by state, has arguably favored larger personal injury firms that are better able to navigate this more complex regulatory system and spread their risk across larger portfolios.[242]

How non-lawyer ownership itself is regulated also helps determine its prevalence. In Australia, non-lawyer owned legal enterprises simply need to register with the appropriate regulator, while in England and Wales they must be licensed.[243] The more burdensome licensing requirement in England and Wales likely reduces the amount of non-lawyer ownership that might otherwise occur.[244] On the other hand, in Australia a lawyer must manage non-lawyer owned enterprises, while in England and Wales a lawyer only has to be part of the management team.[245] This more stringent requirement may discourage some non-lawyer investors from entering the legal market.

4. VARIATION IN CAPITAL AND LEGAL SERVICES MARKETS

Finally, the size of a country's capital and legal services markets help determine the amount and type of non-lawyer ownership one can expect in a jurisdiction. Countries like Australia, without as well developed private equity markets and a relatively small legal services market, have seen far less ownership by non-lawyers than in the United Kingdom, where the population is almost three times larger and there is a broader and deeper range of potential investors.[246]

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240. *See supra* II.A.

241. *See supra* II.A.1.

242. *See supra* II.B.2.

243. *See supra* II.B.

244. *Compare* VICTORIA LEGAL SERVICES BOARD *supra* note 155 (in the state of Victoria there were 921 ILPs in 2013, which allow for non-lawyer ownership even if there was relatively little of this type of ownership), *with* Hilborne, *supra* note 91 (in August of 2014 there were about 360 ABSs in all of England and Wales).

245. *Legal Profession Act 2004* (NSW)(Austl.), *supra* note 34; *Alternative Business Structures*, *supra* note 11.

246. Interview 14, *supra* note 198. In 2009-2012, according to the World Bank, the market capitalization of listed companies was about $1.3 trillion in Australia and $3 trillion in the UK. *Market Capitalization of Listed Companies (Current US$)*, THE WORLD BANK, http://data.worldbank.org/indicator/CM.MKT.LCAP.CD [http://perma.cc/HST4-LGBN] (last visited Oct. 5, 2015). The legal services market in Australia was estimated to have revenues of about $19.9 billion in 2011. *Research and Markets: Legal Services Industry in Australia Expected*

Despite a regulatory environment that generally bars non-lawyer ownership, the United States has seen greater investment in and the rise of more online legal service companies than either the UK or Australia, likely in part because the U.S. capital markets are more robust and the legal services market is substantially larger, creating a more suitable environment to scale online legal services.[247]

If more jurisdictions allow for non-lawyer ownership, in full or in part, one would expect to see an increased number of multi-national legal service companies like Slater & Gordon.[248] Their presence may reduce some of the inter-country differences that have marked the early days of non-lawyer ownership, as these multi-national companies would have access to both legal service and capital markets in different countries allowing them to scale their services more uniformly across jurisdictions. However, in a field like law, models developed in one jurisdiction often cannot be directly adopted by another jurisdiction given significant national and sub-national differences in law and the regulation of legal services. This means the size of relative markets, and the available capital within them, will likely continue to be meaningful constraints on the scale and diversity of non-lawyer owned enterprises delivering legal services in each jurisdiction.

B. NEW BUSINESS MODELS, BUT QUESTIONABLE ACCESS BENEFITS

The country studies provide support to the argument that non-lawyer ownership can, and in some circumstances does, lead to new innovation in legal services, larger economies of scale and scope, and new compensation structures.[249] Yet, perhaps counter-intuitively, there is little evidence indicating that these changes have substantially improved access to civil legal services for poor to moderate-income populations. These findings may be partly the result of limited data, but there are at least four reasons why such ownership will likely not lead to as significant access gains as some proponents suggest.

First, persons in need of civil legal services frequently have few resources and so it is unlikely that the market will provide them these services even where

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to Increase to a Value of $26.4 Billion by the End Of 2016, BUSINESS WIRE (Dec. 12, 2012), http://www.businesswire.com/news/home/20121212006378/en/Research-Markets-Legal-Services-Industry-Australia-Expected#.U9twwagzgXw [http://perma.cc/DHR4-FTH4] (dollar amounts converted from pounds, £, to U.S. dollars, $). The solicitors market (not counting barristers, conveyancers, or other parts of the legal market) in the UK had revenues of about $31.4 billion in 2012. *Evaluation: Changes in Competition in Different Legal Markets*, LEGAL SERV. BD. 4 (Oct. 2013), https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf [https://perma.cc/NTN9-R3FE].

247. U.S. market capitalization averaged $18.7 trillion from 2009-2012. World Bank, *supra* note 246; The U.S. legal services market contributed about $225 billion to GDP in 2012. *Value Added by Industry*, BUREAU OF ECON. ANALYSIS (Jan. 23, 2014), http://www.bea.gov/industry/gdpbyind_data.htm [http://perma.cc/9CYK-5FGY].

248. *See* Rose, *Slater & Gordon Completes Panonne Acquisition*, *supra* note 84.

249. *See supra* II.

non-lawyer ownership is allowed.[250] For example, a bankrupt tenant facing an eviction is likely provided few new options by non-lawyer ownership as they simply have no money to pay for legal services. After cuts in legal aid in the UK, both parties had representation in only about twenty-five percent of private family law disputes did both parties have representation.[251] This indicates that the legal market, even a deregulated one, is unlikely to address the legal needs of poor and middle income persons, who either cannot or will not spend the money to purchase the legal services they require.

Second, several of the legal sectors, like personal injury and social security disability representation, which have seen the greatest investment by non-lawyers, will likely not see corresponding increases in access. In these sectors clients are less sensitive to cost considerations since their lawyers are largely paid through conditional or contingency fees or by insurance companies.[252] Instead, competition amongst personal injury or social security disability representation providers is more focused on reaching persons with credible claims in the first place.

Third, non-lawyer investment may not take place in some areas of the legal market because many legal services may not be easy to standardize or scale. Much legal work is complicated and requires the individualized attention of an experienced practitioner who often charges high rates. Even though many legal problems may have relatively uniform remedies, an experienced practitioner is needed to determine, case by case, the legal problem confronting the client before tailoring an appropriate solution.[253] Non-lawyer ownership may not be able to overcome this challenge in a significantly more efficient way than a traditional worker owned partnership model. Indeed, where the attention of a lawyer is the primary input into a service, and other capital costs are low, a worker owned model could provide advantages over investor ownership.[254]

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250. *See* PLEASANCE & BALMER, *supra* note 39, at 100–101 (noting that respondents to a legal needs survey in England and Wales were more likely to contact lawyers for severe problems and that there were clear links between social disadvantage and legal capability).

251. *See* MINISTRY OF JUSTICE, *supra* note 100.

252. For an overview of the regulatory framework for conditional fee arrangements in England and Wales, *see,* LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 14–16; Australia also largely allows for conditional fee arrangements. See, LAW COUNCIL OF AUSTRALIA, REGULATION OF THIRD PARTY LITIGATION FUNDING IN AUSTRALIA 10 n. 25 (2011), https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RegulationofthirdpartylitigationfundinginAustralia.pdf [PERMA.CC/M8FD-YRTA].

253. In this way legal services may be an example of Baumol's cost disease, or the proposition that salaries in occupations with little or no increase in labor productivity will still rise at corresponding rates to occupations where there has been increases in productivity. This makes goods or services produced by those occupations inflicted with Baumol's cost disease, such as health care or education, relatively more expensive. *See* William J. Baumol, *Health Care, Education and the Cost Disease: A Looming Crisis for Public Choice*, 77 PUB.CHOICE 17 (1993).

254. For example, Hansmann argues worker owned enterprises may be able to better overcome monitoring challenges than some investor owned enterprises. *See* Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L. J. 1749, 1761–62 (1989–1990).

Finally, some persons who could benefit from legal services may be resistant to purchasing them, even if they have the ability to do so, either because they do not believe they need a legal service or because of cultural or psychological barriers.[255] For example, even if the price of preparing a will decreases, many persons still may not purchase one because they do not like to contemplate their own death or do not perceive a will as a need.[256] In other words, for some civil legal services there may not be as much price elasticity in the market as proponents of deregulation suggest.

C. DISTINCT CHALLENGES TO PROFESSIONALISM

While the claims behind the argument that non-lawyer ownership will significantly increase access are largely unsubstantiated by the available evidence, those who oppose non-lawyer ownership on the grounds it will undercut professionalism often make assertions that are too sweeping. Take concerns about commoditization and public spiritedness. Although certainly non-lawyer ownership can place new pressures to increase profits on legal service enterprises, lawyers at many firms were arguably already predominantly driven by this desire. Further, some forms of non-lawyer ownership, such as consumer owned firms, might actually be more likely to pursue a public-spirited mission than a lawyer owned firm.[257] Still, while critics of non-lawyer ownership can overgeneralize or over-estimate its impact, non-lawyer ownership in some contexts can change how legal services are offered in a way that is detrimental to consumers, the public, or the legal system more broadly.

1. CONFLICTS OF INTEREST

The interests of traditional law firms do not always align with their clients, but enterprises that offer legal services that also have other commercial interests are more likely to have conflicting and potentially adversarial interests to their

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But see, Andrew von Nordenflycht, *Does the Emergence of Publicly Traded Professional Service Firms Undermine the Theory of the Professional Partnership? A Cross-Industry Historical Analysis*, 1 J. PROF. & ORG. 1 (2014) (arguing that the proposed benefits of partnerships versus public ownership are largely illusory).

255. *See* Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 244 (Trebilcock, Duggan, & Sossin eds. 2012) (noting that while the cost of lawyers is one factor that explains why justice problems are not taken to lawyers, other factors, like what people perceive as a legal problem, are also significant).

256. *See supra* II.C.2. (observing little change in the number of persons with wills in the United States and Massachusetts).

257. *See, e.g.*, Co-Operative Legal Services in the UK, *supra* II.A.1. Similarly, labor unions in the U.K. have begun to invest in their own law firms, although this may mostly be to recapture referral fees lost when the referral fee ban was introduced. *Leeds Firm Breaks New Ground with Trade Union ABS*, LEGALFUTURES (Dec. 23, 2013), http://www.legalfutures.co.uk/latest-news/leeds-firm-breaks-new-ground-trade-union-abs [http://perma.cc/H3B8-FRNU].

clients.[258] For instance, since insurance companies in the UK have an interest in reducing the amount they compensate claimants, there is a concern that they may have a conflict in acquiring plaintiff personal injury firms.[259] These "captured" law firms may act to either shape outcomes of specific cases or the overall regulatory environment in a way that is beneficial to the insurance industry, but not necessarily their clients.

Where the government outsources functions related to the legal system—like prison or probation services—there is a greater possibility for conflicts of interest to arise. These conflicts can cast doubt on the integrity of the legal system, undermining the public's trust in very real, though sometimes hard to measure, ways. Capita, a large business process outsourcer with multiple contracts with the UK government, has recently entered the legal services market by buying a law firm.[260] Before buying this law firm, Capita already helped run the UK's migrant removal process[261] and, separately, one of the government's telephone hotlines to assess litigants' entitlement to legal aid.[262] While perhaps not a direct conflict of interest, those active in legal aid have expressed concern that immigrants who were worried about the legality of their immigration status would not call the legal aid hotline out of fear that Capita might then try to deport them.[263] This conflict existed before Capita had started its ABS, but similar conflicts could arise in the future with its affiliated law firm, particularly if it began providing legal aid.

Employees of companies that deliver outsourced public services often do not have the same duties as government employees to not further their own (or their company's) financial interests.[264] In this context, non-lawyer ownership creates new possibilities for self-dealing. For instance, attorneys contracted to provide legal aid assistance may refer clients to other services offered by their company, whether or not it was in the client's best interest. Alternatively, a company contracted by a government agency, like the Social Security Administration in the United States, could attempt to use its insider knowledge to benefit those it

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258. As Susan Shapiro notes, one of the primary sources of conflicts of interest for a fiduciary is the diversification and growth of their organization. SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICTS OF INTEREST IN LEGAL PRACTICE 5 (2002).

259. *See supra* II.A.1.

260. Michael Cross, *Capita Enters Legal Services Market with Optima Acquisition*, L. SOC.'Y GAZETTE (Sept. 16, 2013), http://www.lawgazette.co.uk/practice/capita-enters-legal-services-market-with-optima-acquisition/5037679.article [http://perma.cc/X68S-893G].

261. *Capita Gets Contract to Find 174,000 Illegal Immigrants,* BBC NEWS (Sept. 18, 2012), http://www.bbc.com/news/uk-politics-19637409 [http://perma.cc/9EMZ-3P5R].

262. *Capita Acquires FirstAssist*, CAPITA (Sept. 30, 2010), http://www.capita.co.uk/news-and-opinion/news/2010/september/capita-acquires-firstassist-services-holdings-ltd.aspx [http://perma.cc/F2NS-7JCL].

263. Interview 3, in London, Eng. (Jan. 10, 2014).

264. *See generally* Kathleen Clark, *Ethics for an Outsourced Government (Washington University in St. Louis Legal Studies Research Paper No. 11-05-03, 2011)*, http://ssrn.com/abstract=1840629 [http://perma.cc/5U4A-NVEZ] (describing in the U.S. context how outsourced employees do not face the same ethics standards as government employees).

represents before that agency.[265]

Some potential conflicts that may undercut public trust or potentially have long-term detrimental impact to the legal system can be so nebulous that they are difficult to regulate. Walmart is one of the largest employers in the United States and is frequently criticized for its employment practices.[266] If Walmart started offering legal services in the United States, including employment law, some may question if they have a conflict of interest even if lawyers in their stores never directly represented their clients against Walmart. One could argue that Walmart has an interest in shaping employment law in the United States in a direction beneficial to the company and so it is troubling if they start representing a large number of workers for employment claims. At the very least, it may lead some to have less faith in the integrity or fairness of the justice system. However, the amorphous nature of such a potential conflict makes it difficult for a regulator to justify specifically barring Walmart, and not other retailers, from entering the legal services market in employment law.

Finally, non-lawyer ownership not only can create new conflicts of interest, but also can be used to bypass professional regulation, particularly for enterprises offering multiple services. For example, insurance companies in England and Wales, which once referred injured customers to personal injury firms, have bought up these same firms in part to bypass a new ban on referral fees.[267] Similarly, non-lawyer ownership could be used to bypass other regulation such as restrictions on advertising or fee arrangements (particularly where non-lawyers can enter contingency fee arrangements, but lawyers can not, like in Australia). If one believes these professional rules serve a purpose, such actions should be of concern to both regulators and the public.

2. UNDERCUTTING PUBLIC SPIRITED IDEALS

Lawyers may not have an identity as altruistic as that of doctors or the clergy, but most lawyers would acknowledge that the pursuit of profit should not be the sole goal of those in the profession nor making money the dominant criteria for

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265. For example, the SSA awarded Social Security Disability Consultants, a major social security resentation company, a contract in 2006 to study the value of vocational expertise in the disability determination process. *Experts to Study the Value of Vocational Expertise at All Adjudicative Levels of the Disability Determination Process*, FED. BUS. OPPORTUNITIES, https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=7f5130f6fe72ddabc923fad66c1f5ece [https://perma.cc/BC9H-NSXV] (last visited Oct. 5, 2015). Maximus, which has undertaken social security representation, also has been a major contractor for the SSA, particularly for its work training and placement program. Charles T. Hall, *Maximus also has conflict*, SOCIAL SECURITY NEWS (Jan. 27, 2006), http://socsecnews.blogspot.com/search?q=maximus+conflict. [http://perma.cc/4DX6-HJYU].

266. Dave Jamieson, *Feds Charge Walmart With Breaking Labor Law in Black Friday Strikes*, HUFFINGTON POST (Jan. 15, 2014), http://www.huffingtonpost.com/2014/01/15/walmart-complaint_n_4604069.html [http://perma.cc/GM2R-8KBD] (detailing actions by the federal government against Walmart for alleged labor violations).

267. *See supra* II.A.1.

determining what characterizes a "good lawyer" or a "good law firm."[268] Many lawyers value furthering the rule of law, assisting the needy, acting as a check on government or corporate power, providing competent assistance, and other social values.[269] Non-lawyer ownership, especially that by investors seeking profit, can subvert these public-spirited ideals in at least two ways.

First, legal service providers with outside investors are likely to be concerned about the enterprise's reputation within the investor community. The failure to meet a projected financial target can lead to a drop in stock price or the loss of a needed private equity investor.[270] Such concerns about reputation may make these enterprises more likely to focus on meeting investors' targets, as is alleged of publicly listed firms in Australia,[271] at the expense of more public-spirited goals, such as pro bono work or taking on riskier class actions that further the public interest. Importantly, lawyer employees, or lawyer co-owners, may change their behavior to be less public spirited not directly on the orders of non-lawyer owners, but rather if they merely believe such a change will help increase their firm's reputation in the investor community.

Second, companies that also provide other services may be less likely to offer legal services to publicly unpopular clients out of fear of harming the larger brand of their company.[272] For example, in the United Kingdom, the management at the Co-operative Group was initially concerned about Co-operative Legal Services having certain kinds of clients, such as men who had abused their wives, whose association might end up tarnishing their larger brand.[273] This potential problem has ended up being more hypothetical, as Co-operative Legal Services markets themselves as offering services to resolve disputes as amicably as possible, thereby attracting fewer of these clients that are likely to be actively vilified by the public.[274] The example, though, raises the specter that unpopular clients, who

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268. As R.H. Tawney writes, "[Professionals] may, as in the case of the successful doctor, grow rich; but the meaning of their profession, both for themselves and for the public, is not that they make money, but that they make health, or safety, or knowledge, or good government, or good law . . . ." R.H. TAWNEY, THE ACQUISITIVE SOCIETY 94 (1920).

269. For example, a RAND study of class actions in the U.S. found "plaintiff attorneys seemed sometimes to be driven by financial incentives, sometimes by the desire to right perceived wrongs, and sometimes by both." DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 401 (1999).

270. *See supra* II.A.1. (Quindell notably lost half its stock value in one day after an unfavorable market report).

271. *See supra* II.C.1. (Slater & Gordon CEO reassuring investors that in the future most class actions will be funded through outside funders).

272. Lawrence Fox has warned that companies offering other services might be less likely to offer legal services that are unpopular either to the public or the company at issue. Fox, *supra* note 20 ("Can we expect Arthur Andersen to take a tolerant attitude toward a death penalty representation? Or Sears to be pleased its lawyer employees are supporting the Legal Services Corporation, the funder of consumer complaints on behalf of the indigent?").

273. Interview 10, *supra* note 47.

274. *See id*. (another national legal services provider noting that unpopular clients pose a potential challenge to their brand).

already face discrimination from many law firms, might be further marginalized and have fewer alternatives in a market with a smaller number of providers that are highly sensitive to public opinion.

3. STANDARDS OF PROFESSIONAL PRACTICE

Advocates of non-lawyer ownership have claimed that allowing for outside ownership will increase the quality of legal services as these owners will be eager to build well-respected legal brands and have an advantage at implementing quality control systems.[275] Non-lawyer ownership may sometimes improve professional standards, but it is not clear that this would always be the case, or even be the case the majority of the time. In other situations, non-lawyer ownership may lead to the systematization of more dubious business practices that undermine the quality of legal services as firms scale, attempt to create efficiencies, and their work culture is less tempered by the professional norms that lawyer ownership may bring.[276] For example, Binder & Binder has been accused of nationalizing and normalizing questionable cost cutting practices in social security disability representation.[277]

Non-lawyer ownership has so far had an ambiguous impact on consumer complaints about legal services. There is some evidence from the UK that ABS firms receive more complaints from clients than non-ABS firms, but ABSs produce about as many formal complaints to the UK's Legal Ombudsman as ordinary solicitor firms.[278] The higher number of recorded initial complaints may be because of the newness of some of the ABSs operating or because they do a better job of soliciting and tracking initial complaints. In Australia, at least one study has shown that customers of firms that have become ILPs make fewer complaints to regulators afterwards.[279] This though is likely the consequence of ILPs required implementation of their own "appropriate management systems" rather than non-lawyer ownership, which is still relatively rare for ILPs in Australia.[280] So far at least, the evidence from both the UK and Australia suggests

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275. Hadfield, *supra* note 6, at 49–50.

276. Parker, *supra* note 10, at 4 (arguing that the ethical dangers commentators worry will come from non-lawyer ownership are actually a "formalisation and accentuation of existing ethical pressures on legal practice").

277. *See supra* II.C.2 (noting complaints that Binder spearheaded the normalization of not meeting with clients until the day of a hearing).

278. According to a 2013 LSB report ABSs generated £4.3 million in turnover for every complaint referred to the Legal Ombudsman, which is similar to the £4.5 million for every complaint for ordinary solicitors firms. LSB 2013, *supra* note 98, at 7, 78.

279. Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in in Regulation of the Legal Service Profession in New South Wales*, 37 J.L. & SOC'Y 466 (2010) (showing a statistically significant reduction in complaints about ILPs after they performed a self-assessment process to create their own appropriate management systems).

280. Others have argued that the potential dangers of outside investment are not adequately regulated against in Australia. Alperhan Babacan, Amalia Di Iorio, & Adrian Meade, *The (In)effective Regulation of Incorporated*

that non-lawyer ownership does not have a large effect on consumer complaints. Given this uncertain impact, those interested in increasing quality of legal services may be better off pressing for other interventions, such as entity-based regulation, requiring malpractice insurance for all legal service providers, or creating an independent ombudsman to hear complaints.

D. NEED FOR MORE DATA AND THE POTENTIAL IMPACT OF TECHNOLOGY

The country studies make clear that there is a need to improve the collection of data regarding legal services so as to assess the impact of non-lawyer ownership.[281] In particular, regulators should better track the cost of commonly used legal services, the demand for legal services, how these legal services are used, and different pathways for resolving legal issues.[282] Sector specific studies should also periodically examine the functioning of markets for specific legal services such as personal injury, immigration, probate, conveyancing, or family law.

While there are still many unanswered questions about the impact of non-lawyer ownership perhaps the greatest involves the increasing role of technology in legal services.[283] Legal professionals in the future may need to rely on technology, and an accompanying organizational structure, that lawyers cannot efficiently provide for themselves either in-house or otherwise. If this proves true, then non-lawyer ownership will provide clear benefits for the delivery of legal services. Still, it is not certain such a future is ordained. Lawyers may find a way to effectively outsource or contract for these technological and organizational needs just as they currently do for legal databases or for online advertising.[284] Alternatively, as is the case with LegalZoom, lawyers and their services may become the outsourced product offered by a company. Finally, the most routinized legal services—those that technology may have the greatest benefit in helping deliver efficiently—may, eventually, not be considered the practice of law at all; either lawyers or non-lawyers would be able to perform these services in different organizational and ownership contexts.

Legal Practices: an Australian Case Study, 20 INT'L J. LEGAL PROF. 315 (2013) (arguing that regulation of ILPs in Australia does not sufficiently account for new pressures from non-lawyer owners and managers).

281. *See supra* II. England and Wales are the furthest along in gathering relevant data.

282. LEARNING FROM LONG TERM EXPERIENCES, *supra* note 99, at 47 (making similar recommendations in the UK context).

283. RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008) (speculating about the transformative role technology may have in legal services); Gillers, *supra* note 46 (arguing the regulation of the profession should be adopted to harness technological changes transforming the delivery of legal services); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014) (describing how technology, particularly machine intelligence, may disrupt the legal services market in the future).

284. For example, law firms will subscribe to legal databases like Westlaw or referral networks like lawyers.com.

IV. NON-LAWYER OWNERSHIP AND A "NEW PROFESSIONALISM"

The rise of non-lawyer ownership of legal services should not be viewed in isolation. It is useful to think of those who perform traditional legal work as being controlled or organized by at least four forces: (1) the demands of the market, (2) the structure and bureaucracy of the organizations in which they work, (3) the legal profession, and (4) the government.[285] While lawyers have always had to be responsive to market pressures, it is notable that lawyers are both becoming integrated into firms that are more similar to other types of commercial organizations and that their relationship with the rest of the economy is becoming more like those of other services.[286] For example, the lifting of bans on advertising,[287] the abolition of mandatory fixed fee schedules for lawyers,[288] and increased consumer awareness of their legal options that has been witnessed in some jurisdictions have made lawyers more responsive to conventional market forces. The rise of limited liability enterprises in legal services[289] and non-lawyer owned legal service companies in some jurisdictions have embedded lawyers in organizations more similar to those in other fields. The reducing regulatory power of the bar and the rise of new outside regulators of the profession, whether these are independent ombudsmen, specialized regulators, or competition regulators has seen the government increasingly encroach on the self-regulatory power of the profession.[290] Other professions, such as doctors, accountants, teachers, and architects, have seen similar shifts–witnessing greater integration of their occupations into the overall economy and into more varied organizational forms, as well as greater outside regulation.[291] Indeed, such broader trends have led some to conclude we are witnessing the birth of a "new professionalism,"[292] that

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285. Eliot Freidson, one of the founders of the sociology of professions, argued that consumers control how work is organized in the market, bureaucracies control work in organizations, and other members of an occupation control work in a profession. *See* ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC 12 (2001).

286. *See* STEPHEN BRINT, IN THE AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE (1994) (arguing that professions are becoming marketized and commercialized and as a result their rhetorical justifications have shifted from social trusteeship to expertise).

287. For a brief history of the relaxation of restrictions on lawyer advertising in the United States, *see* DEBORAH L. RHODE AND DAVID LUBAN, LEGAL ETHICS 622–25 (1995).

288. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1979), the U.S. Supreme Court ruled that lawyers were engaged in a "trade or commerce" and that bar mandated minimum fee schedules violated anti-trust rules.

289. For a history of the spread of the Limited Liability Partnership form in the United Sates since the 1990s, see ALAN R. BROMBERG AND LARRY E. RIBSTEIN, LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) 3–15 (2012).

290. For example, in the U.K., regulatory power has shifted away from the bar to independent regulators like the Legal Services Board, the Legal Ombudsman, and the Solicitor Regulatory Authority. *See supra* II.A.

291. *See* Julia Evetts, *A New Professionalism? Challenges and Opportunities* 59 CURRENT SOC. 406, 412–14 (July 2011) (describing how professions increasingly emphasize quality control, standardization, and other managerial and governance forms of control).

292. *Id*. at 412; *see also* Sigrid Quack & Elke Schubler, *Dynamics of Regulation and the Transformation of Professional Service Firms: National and Transnational Developments*, *in* OXFORD HANDBOOK OF PROFESSIONAL SERVICE FIRMS (forthcoming 2016) (on file with author) (describing how the advance of competition

has led to battles about the "corporatization" of fields such as medicine and education.[293]

These shifts do not mean that professions are disappearing or becoming less significant, even if they might be becoming less distinctive. Occupational licensing and the competency and signaling that go with it has only increased in prominence in countries like the United States.[294] In today's "law-thick" world it is hard to imagine that there will not continue to be a vital and extensive role for legal professionals in the foreseeable future.[295] Still, these broader trends facing the legal profession, of which non-lawyer ownership is a key component, raise questions about how to understand and manage these changes. While it is not possible here to systematically lay out such an analytical or normative agenda, this Article provides a number of takeaways relevant to the access debate and how to best regulate legal services to cope with non-lawyer ownership amongst broader shifts in the profession.

A. ACCESS IMPLICATIONS

Permitting non-lawyer ownership of legal services is frequently viewed as a relatively inexpensive regulatory intervention to increase access to legal services. Yet, the access benefits of non-lawyer ownership so far seem questionable. At the very least, the available evidence should warn against viewing non-lawyer ownership as a substitute for more proven access strategies, like legal aid.

In general, deregulatory strategies have had a mixed track record of increasing access in a substantial manner. As perhaps the most comprehensive review of the literature on the regulation of legal services noted, "The theoretical literature, on the whole, suggests fairly strong recommendations to policymakers regarding self-regulation [towards deregulation]. On the other hand, the limited empirical

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policy, the liberalization of company forms, a shift towards more public oversight, and an increasingly transnational entanglement of the state have led countries to regulate professional service firms more like multinational companies).

293. For a recent debate about the corporatization of medicine, see *Sunday Dialogue: Medicine as a Business*, N.Y. TIMES (Feb. 8, 2014), http://www.nytimes.com/2014/02/09/opinion/sunday/sunday-dialogue-medicine-as-a-business.html [http://perma.cc/54SB-LH2C]; for one perspective about the corporatization of education, see Paul Nevins, *Shall We Corporatize Public Education Too?*, SALON (Oct. 5, 2012), http://open.salon.com/blog/paul_nevins/2012/10/05/shall_we_corporatize_public_education_too [http://perma.cc/H7JU-ZU8Z].

294. In fact, the professions are arguably organizing work life more than ever before. In the United States in 2008, twenty-nine percent of the labor force was in an occupation that required a license (compared to less than five percent in the 1950s). Although not all these occupations would be considered "professions" many would. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 331 J. LAB. & ECON. S173, S175–S176 (2013).

295. As Gillian Hadfield observes, "We live in a law-thick world that people are left to navigate largely in the dark." Hadfield, *supra* note 6, at 43.

evidence does not always support such strong theoretical predictions."[296] This does not mean these deregulatory strategies are not worth pursuing, but rather expectations about their impact should be appropriately tempered. For example, several studies have indicated that more advertising leads to lower priced legal services.[297] A well known study undertaken by the FTC in the 1980's in the United States found that the five legal services it surveyed were cheaper on average in states with fewer restrictions on lawyer advertising than in states with more restrictions.[298] However, the report also found that within the same state law firms that advertised personal injury services actually charged higher contingency fees than those that did not advertise.[299] Stewart Macaulay in surveying, and questioning, the results of the FTC report argued that even if lawyer advertising did somewhat decrease the price of legal services that, "[W]e must be concerned that largely symbolic debates about lawyer advertising may divert us from concern with more pressing issues of access and equality."[300]

Other regulatory solutions, such as new, and more varied, types of legal professionals, who require less training than traditional lawyers, could potentially increase access more than non-lawyer ownership. For example, in both Australia and the United Kingdom there is limited evidence to suggest that licensed conveyancers transfer property at significantly lower prices than solicitors,[301] although a more nuanced UK study of particular geographic regions where conveyancers had entered the market versus where they had not produced more ambiguous results.[302] Whatever the evidence, creating new categories of legal professionals who can perform a subset of legal activities requires a sufficient market. In the UK during the 2008 economic and housing downturn conveyancers were particularly hard hit, reducing the number of persons who were willing

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296. Frank H. Stephen, James H. Love & Neil Rickman, *Regulation of the Legal Profession*, *in* REGULATION AND ECONOMICS 647, 670 (Roger J. Van Den Bergh & Alessio M.Pacces eds. 2012).

297. Id. at 658.

298. JACOBS, WILLIAM W. ET AL., F.T.C., IMPROVING ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 79 (1984) (finding, "[a]ttorneys in the more restrictive states, on the average, charged higher prices for most simple legal services than those in the less restrictive states.").

299. *See id*. at 125.

300. Stewart Macaulay, *Lawyer Advertising: "Yes, but . . ."*, 75 (Inst. for Legal Studies, Working Papers No. 2, 1986) (on file with the G.J. Legal Ethics).

301. BDRC CONT'L, *supra* note 39, at 86 (noting that conveyancing in the UK is more expensive when done by a solicitor compared to a licensed conveyancer—nearly £1,300 versus £785 on average); NSW GOVERNMENT SUBMISSION, PRODUCTIVITY COMMISSION REVIEW OF NATIONAL COMPETITION POLICY ARRANGEMENTS 10 (2005), http://www.pc.gov.au/__data/assets/pdf_file/0020/47342/sub099.pdf [http://perma.cc/3YDN-2VDA] (noting that conveyancing fees in New South Wales fell by seventeen percent between 1994 and 1996 after the removal of the legal profession's monopoly on conveyancing).

302. Stephen, Love, & Rickman, *supra* note 296, at 656 (noting that the results of a UK study of conveyancers in the early 90s "should caution against the assumption that multiple professional bodies will necessarily be to the benefit of customers").

to enter conveyancing.[303] While the housing market over the long run may provide a sufficiently large market for a practitioner to invest in the expense of becoming a conveyancer (and not the additional expense of becoming a solicitor) other legal markets may not be robust enough to support their own specialized legal practitioners.

There is a rich theoretical literature that argues unauthorized practice of law (UPL) provisions are too broad, increasing prices and limiting access as a result of their implementation.[304] While there has been little empirical research done to support this proposition[305] limiting the reach of UPL provisions intuitively has merit as an access strategy. However, it is not always obvious what services should be regulated and which should not. For instance, in the UK will-writing is not a reserved legal activity, an open market position that some advocates for looser UPL restrictions might cheer. The UK Legal Services Board (LSB) though on the basis of a study and consumer feedback is pressing the government, so far unsuccessfully, to regulate will-writing as a legal activity.[306] The LSB argues that some will-writing companies use the power and information asymmetry with their customers to sell defective, unnecessary, and costly wills, undercutting the trust of the public in the will-writing market.[307] This experience has parallels to criticisms of "trust mills" in the U.S., which sell un-customized documents to create trusts to seniors at exorbitant rates.[308]

Besides forms of fee shifting and sharing,[309] the two primary alternatives to deregulation to increase access to civil legal services are pro bono and legal aid. Pro bono already plays a vital role in delivering legal services, and should be expanded where possible, but it also has clear constraints both in terms of the amount and type.[310] Pro bono may also come under new pressure in a regulatory

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303. Between 2007 and 2011 there was a decline in the number of students studying to become a conveyancer from 1930 to 497. COUNCIL FOR LICENSED CONVEYANCERS, ANNUAL ACCOUNTS 25 (2011), http://www.clc-uk.org/pdf_files/corporate_docs/Annual_Report_2011.pdf [http://perma.cc/F2NJ-CRXK].

304. *See, e.g.*, ABEL, *supra* note 21, at 127-141 (1991); RHODE, *supra* note 1, at 87–91.

305. Stephen, Love, & Rickman, *supra* note 296, at 655 (noting "little empirical work has been done by economists to estimate the effects of professional monopoly rights . . .").

306. LEGAL SERV. BD., SECTIONS 24 AND 26 INVESTIGATIONS: WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES 14–16 (2013), http://www.legalservicesboard.org.uk/Projects/pdf/20130211_final_reports.pdf [http://perma.cc/6TCL-MPCK].

307. The LSB does not propose that will-writing only need to be performed by solicitors, but that it could also potentially be performed by other licensed legal professionals like paralegals. *Id*. at 24.

308. *See, e.g.*, Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59(3) MD. L. REV. 595, 608 (2000) describing how trust mills may victimize unsuspecting seniors into buying trusts that do not accomplish their goals.

309. Class actions and contingency fees are two forms of fee sharing or shifting that can increase the ability of litigants to bring cases, particularly in cases that involve monetary damages against large businesses. For a recent overview of U.S. Supreme Court litigation limiting class actions and supporting binding arbitration on companies terms, see LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 282–299 (2014).

310. *See* Cummings, *supra* note 2, at 115–144.

regime that allows for non-lawyer ownership, with investor owners influencing lawyers to engage in either less pro bono or less controversial pro bono in order to increase profits. Given these limits of pro bono, increasing legal aid may be the best option to significantly expand access to legal services.

Indeed, perhaps the most noticeable change in access was not produced by any shift in regulation or by pro bono activity, but instead by cuts in UK legal aid, which created a large increase in pro se litigants in family court.[311] Given recent dramatic cuts in the UK legal aid budget and declining or stagnating legal aid budgets in the United States[312] and Australia,[313] advocating for renewed investment in legal aid may seem like an unrealistic strategy. Yet, the alternative of relying on regulatory changes or a dramatic increase in pro bono assistance to address access needs seems even more far-fetched. Increases in government spending may also become more realistic if regulatory strategies to improve access seem largely exhausted. Recent surveys in the United States, United Kingdom, and Australia showing that in many instances the government actually saves money in the long run by providing legal aid may further incentivize such spending.[314] Finally, the relatively small amount of money spent on government legal aid for civil legal services makes it more plausible that there could be a marked increase in legal aid budgets.[315]

Importantly, increased public spending on legal assistance does not have to be directed towards "traditional" legal aid where a publicly employed legal aid attorney guides a client through a legal problem from start to finish. Where appropriate, government intervention could also include legal assistance and advice provided by non-lawyers,[316] "unbundled" legal assistance,[317] provision of

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311. *See supra* II.A.2.

312. *Funding History*, *supra* note 1.

313. In 1997 Prime Minister Howard's government instituted major cutbacks in the Commonwealth's funding of legal aid. While Australian states made up for some of these cuts, civil legal aid programs were curtailed by legal aid commissions. PRICE WATERHOUSE COOPERS, LEGAL AID FUNDING: CURRENT CHALLENGES AND THE OPPORTUNITIES OF COOPERATIVE FEDERALISM 19, 57 (2009); CMTY LAW AUSTRALIA, UNAFFORDABLE AND OUT OF REACH: THE PROBLEM OF ACCESS TO THE AUSTRALIAN LEGAL SYSTEM 9 (2012).

314. For an overview of studies showing the cost savings of legal aid in the United States, the United Kingdom, Australia, and Canada, see GRAHAM COOKSON & FREDA MOLD, THE BUSINESS CASE FOR SOCIAL WELFARE ADVICE SERVICES (July/Aug. 2014), http://www.lowcommission.org.uk/dyn/1405934416347/LowCommissionPullout.pdf [http://perma.cc/P2PF-ZKAF]; BOSTON BAR ASS'N, INVESTING IN JUSTICE: A ROADMAP TO COST EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 4–5 (2014) (noting findings of independent consulting firms that in certain categories of cases the government will save from $2 to $5 for every $1 spent in civil legal aid).

315. *Funding History*, *supra* note 1; RHODE, *supra* note 1, at 187 (noting that U.S. federal spending on civil legal aid could be tripled for only $1 billion. A fact that remains true ten years later).

316. Several studies have shown that, at least in some situations, non-lawyers can be just as effective or more so than lawyers. In the U.K., they have long relied on non-lawyers in their legal aid scheme. *See, e.g.*, Richard Moorhead, Alan Paterson, &Avrom Sherr, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37(4) L. & SOC'Y REV. 765, 794–96 (2003) (finding that non-lawyers perform at a higher standard than lawyers in a study of the UK's legal aid system, but that non-lawyers took more hours on the same case and so cost more, perhaps because of contractual incentives); HAZEL GENN &YVETTE GENN, THE EFFECTIVENESS

legal self-help information, and public legal expenses insurance.[318] Such programs should be targeted at both the poor and middle class.

Where non-lawyer ownership of legal services is adopted it should be adapted to maximize its access benefits. This might be through encouraging consumer ownership, or other types of non-lawyer ownership, that may be more likely to increase access. Some jurisdictions could also choose to tax non-lawyer owned firms to subsidize the government's legal aid budget. Traditionally, one of the justifications of pro bono was that lawyers should provide legal services to those who cannot afford them in exchange for the benefit they receive from having a monopoly on legal services.[319] Since non-lawyer owners, unlike lawyer owners, cannot provide pro bono legal services they could be expected to contribute monetarily for being able to benefit from this monopoly as well. Finally, a jurisdiction could encourage that non-lawyer owned companies be set up as benefit corporations, explicitly stating that directors must consider not only maximizing profits in the decisions they make, but also increasing access to justice. Given the loose reporting standards of benefit corporations, adopting this form would certainly not guarantee these enterprises would promote access.[320] However, such an organizational form might encourage these companies to pursue more public-spirited missions and would help protect legal service companies that did engage in extensive socially minded work from shareholder suits alleging that the company did not focus on maximizing profits.[321]

B. REGULATORY IMPLICATIONS

This Article only examined non-lawyer ownership's impact on access and professionalism for civil legal services for poor and moderate-income popula-

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OF REPRESENTATION AT TRIBUNALS, REPORT TO THE LORD CHANCELLOR 245–46 (1989) (finding that experience and expertise were reported as being more important than being a lawyer to successfully represent a client in the U.K. tribunal system); HERBERT KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998) (finding that non-lawyer assistance was just as effective as lawyer assistance in three of the four U.S. case studies examined).

317. For an overview of the literature on unbundled legal assistance, see Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825 (2012).

318. For one proposal for a publicly sponsored opt-out legal expenses insurance scheme in Canada, see Sujit Choudhry, Michael Trebilcock, & James Wilson, *Growing Leal Aid Ontario into the Middle Class: A Proposal for Public Legal Insurance*, *in* MIDDLE INCOME ACCESS TO JUSTICE (Michael Trebilcock, Anthony Duggan, & Lorne Sossin eds. 2012).

319. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2419 (1999).

320. It could even weaken directors' accountability as they can blame poor performance on trying to serve the multiple goals of the company. *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporations Statutes* 2AM. U. BUS. L. REV. 1, 33 (2012).

321. *Id*. at 16 (noting that existing law in the U.S. likely already provides protection from shareholder suits for pursuing social goals, but that benefit corporations do add clarity to such protections).

tions.[322] That said, the case studies and other evidence presented in this Article do suggest that there is a need for careful regulation of non-lawyer ownership. This is truer of some types of non-lawyer owned enterprises than others. For example, non-lawyer ownership per se does not necessarily create significant new conflicts of interest. A publicly listed law firm may not have any more conflicts than a lawyer owned firm. Instead, new conflicts of interest seem to be most likely to occur for enterprises that offer legal services, but also have other commercial interests. Even of these enterprises, it is only a subset that is most likely to develop new conflicts.

Given this context, regulators should not treat all types of non-lawyer ownership the same. In situations where the potential for conflict of interest, or perceived conflict of interest is high, jurisdictions adopting non-lawyer ownership should ban such ownership, or at least heavily regulate it. When the potential for conflict is more amorphous or where the public spirited ideals of the profession, professional standards, or other values of the profession may be undermined, regulators should exercise their choice on when and how to intervene, using the available evidence to weigh the costs and benefits of different types of non-lawyer ownership.

Jurisdictions might adopt several approaches to regulate non-lawyer ownership. They could have blunt and restrictive rules, such as that non-lawyers can only own a minority of any legal services firm or only own non-voting shares.[323] They might allow for non-lawyer ownership only in some legal sectors, or in all, or could bar legal services from being provided by enterprises also engaged in other types of services. They could have more fine-tuned licensing requirements where potential non-lawyer owners had to submit plans about how they would overcome potential conflicts of interest that would be subject to approval. Or they could only require licensing in certain sectors (like criminal law) or for certain types of owners. The point here is to not go through every possible permutation of regulation and weigh its respective merits (some may be sensible, some unwise, and others would require far more regulatory capacity than others). Rather, it is simply to observe that in designing a regulatory regime for non-lawyer ownership that a regulator faces a large number of choices many of which could plausibly be justified.

Given this extensive regulatory menu of options and the still limited empirical basis upon which to make these choices, who the regulators are making these

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322. Notably, it did not study how non-lawyer ownership impacts other parts of the legal market (such as the criminal or corporate sector), how it might impact other clients (such as the upper middle class, corporations, or government), or how it might affect volatility in the legal services market, the satisfaction of legal professionals with their jobs, or other relevant considerations. For example, John Morley argues that investor ownership would have made recent law firm collapses less likely. *See* John Morley, *Why Law Firms Collapse: The Fragility of Worker Ownership* (Aug. 2014) (unpublished manuscript) (on file with author).

323. For instance, Singapore recently adopted minority non-lawyer ownership. Hyde, *supra* note 15.

decisions becomes all the more significant. In the past, the academic literature has been preoccupied with lawyers capturing their own regulation to further their own interests.[324] Examples of this type of regulatory capture are arguably seen in the non-lawyer ownership debate. For instance, in rejecting non-lawyer ownership wholesale, the New York Bar's Taskforce on Non-Lawyer Ownership (the Taskforce), comprised exclusively of members of the bar, noted that there was not sufficient empirical evidence to know the impact of non-lawyer ownership and "that it was not worth taking the risk of impacting the core values of our profession by allowing non-lawyers to hold equity interests in law firms."[325] This intense caution expressed by the Taskforce, and blanket refusal to experiment, can be seen as a protectionist decision that ensures that lawyer owners do not have to compete with non-lawyer owners for either profits or prestige.

With the advent of non-lawyer ownership there is a concern that new outside actors, who can now profit from legal services, may also try to capture the profession's regulation. For example, the Clementi report was instrumental in ushering in non-lawyer ownership in the UK.[326] In recommending its largely wholesale adoption to the UK government, David Clementi argued that, "The burden of proof [in the debate over non-lawyer ownership] rests with those who seek to justify the restrictive practice."[327] This was a very different burden of proof than the Taskforce of the New York Bar, which in the face of unclear evidence favored the status quo. Perhaps not surprisingly, Clementi is not a lawyer, but a Harvard Business School graduate who had been prominently involved in the movement to privatize government companies in the UK. He was also the chairman of a major insurance company when he wrote the report.[328] Today, the current head of the Legal Services Board is Richard Moriarty, who is not a lawyer, but came from a competition background and before joining the LSB was the director of regulation at a private water supply company owned by Morgan Stanley.[329]

There is little reason to believe the divergent positions on non-lawyer ownership of these regulators, whether members of the bar or competition advocates, are not sincere. However, given these regulators backgrounds they are

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324. *See*, *e.g.*, ABEL, *supra* note 21, at 44–48 (arguing lawyers use professional ideology to gain market control); WINSTON ET AL., *supra* note 3, at 24–56, 82–91 (2011) (claiming that lawyers capture high rents because of licensing).

325. NYSBA REPORT, *supra* note 8, at 73.

326. *See also* E. Leigh Dance, *The U.K. Legal Services Act: What Impacts Loom for Global Law Firm Competition*?, 34 L. PRAC. 28, 35 (2008).

327. CLEMENTI REPORT, *supra* note 44, at 132.

328. David Clementi was the Chairman of Prudential LLC until 2008. *David Clementi, Executive Profile*, BLOOMBERG, BUSINESS http://www.bloomberg.com/profiles/people/1538052-david-cecil-clementi [perma.cc/K33J-TPUU] (last visited December 23, 2015).

329. *See* Kathleen Hall, *Super-Regulator Appoints New Chief Executive*, L. SOC'Y GAZETTE (Oct. 22, 2014), http://www.lawgazette.co.uk/practice/super-regulator-appoints-new-chief-executive/5044599.fullarticle [http://perma.cc/DT56-6MJH].

likely to emphasize different priorities for the organization of a legal market. In a world of non-lawyer ownership, one should expect that large legal service companies, and their owners, will try to influence regulators to approve regulation that benefits them, but may disadvantage the public or smaller, more traditional legal service enterprises.[330] In other words, we should expect that non-lawyer owned companies will pressure regulators just as lawyer owned law firms have historically.

More and better data will likely continue to be collected on jurisdictions' experiences with non-lawyer ownership. This could reduce some of the potential for regulatory capture by interest groups by limiting the discretion of regulators in their choices. However, much of non-lawyer ownership's ultimate effect on both access and professionalism is likely to be subtle and remain difficult to quantify.[331] It is unclear how one would accurately measure whether certain types of non-lawyer ownership negatively affected the public's perception of the justice system and the consequences of any such change in attitude. Similarly, in many cases it will likely be challenging to trace whether new innovations in delivering legal services arose because of non-lawyer ownership or other factors. Yet, these are precisely the types of issues that we want regulators to consider. There is a danger that if regulators only make decisions based on what they can measure with specificity that they will deemphasize factors they cannot easily quantify, but may be just as, or more, important.[332] One can attempt to overcome this bias through more qualitative studies, such as not only commissioning a survey on the public's perception of non-lawyer ownership, but also undertaking in-depth interviews with the public or surveying the history of the impact of other similar regulatory changes. These studies though may generate as many questions as answers and could often prove too costly to undertake.

Given the frequently uncertain consequences of non-lawyer ownership, as well as the competing priorities of potential regulators, it is unlikely that in the near

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330. JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER 20 (2008) (noting that "large corporations often use their political clout to lobby for regulations they know they will easily satisfy, but that small competitors will not be able to manage").

331. Limited liability partnerships provide a parallel example of the difficulties of assessing impact. At the time of their introduction in the 1990s and 2000s, there were warnings that LLPs would reduce the incentive of partners to monitor each other's behavior leading to a decline in professional conduct. *See, e.g.*, N. Scott Murphy, *It's Nothing Personal: The Public Costs of Limited Liability Partnerships*, 71 IND. L. J. 201 (1995) (arguing that LLPs shift the costs of underinsured legal practices from firms to clients). Although nightmare scenarios about the effect of LLPs did not come true, law firms today might, and some commentators claim do, engage in riskier conduct than in earlier decades, helping contribute to law firm collapses like Dewey & LeBoeuf. *See* Michael Bobelian, *Dewey's Downfall Exposes the Downfall of Partnerships*, FORBES (June 7, 2012), http://www.forbes.com/sites/michaelbobelian/2012/06/07/deweys-downfall-exposes-the-demise-of-partnerships/ [perma.cc/2KML-AYR5]. However, given the multiple factors that influence firm behavior we might never know the full effect of the widespread adoption of LLPs.

332. The availability bias, judging probability on the basis of evidence that is easily cognitively available, is a well-known problem in people's ability to assess risk. *See* Cass Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1358 (2011).

future there will be expert consensus on how to regulate such ownership. Instead, such decisions should be made through regulators drawn from a diverse set of stakeholders.[333] This more deliberative approach should include not only members of the bar or competition advocates, who tend to weigh a narrow, if valid, set of concerns, but also consumer groups, access advocates, academics, and other professional organizations that deal directly with the public's legal challenges (like doctors, educators, and accountants).[334]

While reforms like non-lawyer ownership, which make legal services less distinct and more integrated into the market, provide opportunities to better deliver legal services, they do not always solve the problems they were expected to and may generate their own array of challenges.[335] There is a danger that the push to deregulate legal services may come to dominate the access to justice agenda as deregulation and competition become central tenants of a new set of ideals about how to organize the delivery of legal services.[336] Instead, the goal of regulation of legal services should not be deregulation for its own sake, but rather to increase access to legal services that the public can trust delivered by legal service providers who are part of a larger community that sees furthering the public good as a fundamental commitment.

CONCLUSION

The adoption of non-lawyer ownership of legal services may, in some instances, bring access and other benefits. However, the evidence so far does not indicate that these access gains will be as significant for poor and moderate-

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333. Such a multi-stakeholder strategy draws on scholarship on deliberative democracy that does not assume consensus, but rather how to manage conflict given different normative stances of participants. *See* AMY GUTMAN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 10 (2004).

334. Having a diverse group of regulators may have the added benefit of shielding regulation from future anti-trust scrutiny in the U.S. context. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Anti-Trust Scrutiny*, 162 U. PA. L. REV. 1093, 1155 (2014); Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 431–38 (2008) (arguing that one of the benefits of the move towards non-lawyer ownership may be to trigger an acceptance that the practice of law is a business and a move away from self-regulation and towards regulating legal services as an industry).

335. In most fields—not just the legal profession—a striking feature of the spread of regulation across jurisdictions is that new regulatory frameworks are frequently adopted more on the basis of ideology, or to harmonize with global norms, than on concrete evidence of their merit. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 17 (2000) (explaining that the key processes of the globalization of business regulation are "coercion, systems of reward, modeling, reciprocal adjustment, non-reciprocal coordination, and capacity-building." Note that evidence-based learning is not amongst the most important mechanisms identified).

336. Edward Shinnick, Fred Bruinsma & Christine Parker, *Aspects of regulatory reform in the legal profession: Australia, Ireland and the Netherlands* 10(3) INT.'L J. LEGAL PROF. 237, 246–47 (2003) (noting that there is "... a danger that the ongoing impetus for regulatory reform of the legal profession will be the ... competition agenda alone and that access to justice and consumer critiques of the legal profession will disappear from the debate").

income populations as some proponents suggest, and if non-lawyer ownership is seen as a substitute for other access strategies, like legal aid, such a deregulatory reform strategy could even have a detrimental impact. At the same time, the evidence also does not indicate that the professionalism concerns raised by non-lawyer ownership justify a blanket ban. Instead, jurisdictions adopting non-lawyer ownership should be aware of the potential dangers that such ownership can raise, including the possibility of new types of conflicts and the capture of regulators by interests that can now profit from legal services. Mitigating against these possibilities of non-lawyer ownership will require robust, independent, and well-informed regulators.[337]

337. Flood, *supra* note 38, at 508–09 (arguing liberalization of legal services requires new types of regulation).

THE PRECLUSION OF NONLAWYER OWNERSHIP OF LAW FIRMS: PROTECTING THE INTEREST OF CLIENTS OR PROTECTING THE INTEREST OF LAWYERS?

LOUISE LARK HILL*

I. INTRODUCTION

Nonlawyer ownership of law firms is a controversial issue. It has been discussed by legal professionals in the United States for close to a century[1] and, most recently, by the American Bar Association (ABA) Commission on Ethics 20/20 (Ethics 20/20), which was charged with "conducting a plenary assessment of the ABA Rules of Professional Conduct and related ABA policies."[2] As part of this assessment, Ethics 20/20 considered alternative law practice structures in which nonlawyers would have an ownership interest in law firms.[3] A working group was formed that considered "whether lawyers and law firms, in order to better serve their clients, should be able to structure themselves differently than is currently permitted under the Model Rules of Professional Conduct" (Model Rules).[4] After careful study and evaluation, Ethics 20/20 decided not to recommend that the ABA support this change.[5] Although allowed in many

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[1] *See* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 582–83 (1989).

[2] ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (Aug. 2012) [hereinafter ETHICS 20/20], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.authcheckdam.pdf.

[3] *Id.* at 2.

[4] WORKING GRP. ON ALT. BUS. STRUCTURES, ABA COMM'N ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES 1 (Apr. 5, 2011) [hereinafter ISSUES PAPER], *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf.

[5] Press Release, ABA Comm'n on Ethics 20/20, ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120416_news_release_re_nonlawyer_ownership_law_firms.authcheckdam.pdf.

countries and in one jurisdiction in the United States,[6] it was determined that, "[b]ased on the Commission's extensive outreach, research, consultation and the response of the profession, there does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms."[7]

This Article begins by taking a historic look at the prohibition against nonlawyer ownership of law firms in the United States.[8] Next, the Article reviews the ABA's consideration of alternative business structures for law firms at the turn of the twenty-first century,[9] and it follows with an examination of some of the practice entities that have been embraced outside of the United States.[10] In Part V, this Article explores the most recent undertaking by the ABA to examine alternative business structures;[11] and finally, it addresses the various rationales behind the polar positions taken on this issue.[12] The ultimate question is whether lawyers in the United States are seeking to protect the clients or themselves. This author takes the position that it is the latter.

II. THE HISTORY AND DEVELOPMENT OF NONLAWYER OWNERSHIP OF LAW FIRMS

A primary purpose of the codes of legal ethics, since their inception in the United States, has been "to protect client rights of confidentiality and loyalty"[13] and to preserve "the exercise of a lawyer's independent professional judgment in service to the client."[14] To accomplish these objectives, the legal profession's ethical rules contain provisions designed to safeguard certain values. The Model Rules, on which the individual states' professional conduct rules are based,[15] address the matter of

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[6] *Id.*

[7] *Id.*

[8] *See infra* Part II

[9] *See infra* Part III.

[10] *See infra* Part IV.

[11] *See infra* Part V.

[12] *See infra* Part VI.

[13] ABA Comm'n on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Developments*, PROF. LAW., Fall 1998, at 1, 1 [hereinafter *Background Paper*].

[14] *Id.* at 6.

[15] "While most states in the United States have adopted the Model Rules, lawyers are not provided with a uniform standard since interpretational differences exist among the jurisdictions, as do differences in the text of some of the rules." Louise L. Hill, *Gone but*

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confidentiality of information in Model Rule 1.6.[16] The comments to Model Rule 1.7, one of several conflict-of-interest rules,[17] address loyalty

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Not Forgotten: When Privacy, Policy and Privilege Collide, 9 NW. J. TECH. & INTELL. PROP. 565, 570 n.37 (2011). This is especially true with the 2012 and 2013 revisions to the Model Rules, since the majority of states are just beginning to undertake their consideration. *See* Samson Habte, *Now that Ethics 20/20 Project Is Completed Courts, State Bars Will Determine Its Impact*, 29 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 282, 282 (2013). The first state to adopt the 2012 Model Rule revisions was Delaware, in January 2013. *Id.* at 282–83.

[16] Titled "Confidentiality of Information," Model Rule 1.6 currently provides as follows:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or,
>
> (6) to comply with other law or a court order.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(*continued*)

as an essential element in the lawyer-client relationship.[18] Model Rule 5.4, a rule that focuses on the professional independence of a lawyer, is designed to limit the influence of third parties.[19] It was Model Rule 5.4

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013). Model Rule 1.6, and its commentary, were revised in 2012 as part of Ethics 20/20's recommendations to the ABA House of Delegates. *See* Joan C. Rogers, *Ethics 20/20 Rule Changes Approved by ABA Delegates with Little Opposition*, 28 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 509, 509 (2012).

[17] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013).

[18] The comments to Model Rule 1.7 begin by providing that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." *Id.* R. 1.7 cmt. 1. The essential element of "independent judgment" was added to that of "loyalty" in the 2002 Model Rule revisions. *Compare id.* R. 1.7 cmt. 1 (2000), *with id.* R. 1.7 cmt. 1 (2002).

[19] *See* L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133, 140 (2001). Model Rule 5.4, on professional independence of a lawyer, provides as follows:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
>
> (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
>
> (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
>
> (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
>
> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
>
> (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:
>
> (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the

(*continued*)

that initially came under close scrutiny in discussions involving nonlawyer ownership of law firms.[20]

The Model Rules were adopted by the ABA in 1983.[21] They were implemented as an alternative to the Model Code of Professional Responsibility (Model Code),[22] which replaced the Canons of Professional Ethics (Canons) in 1969.[23] The Canons, which were promulgated and adopted by the ABA in 1908,[24] did not address the matter of lawyer and

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> stock or interest of the lawyer for a reasonable time during administration;
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> (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
>
> (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

[20] *See* Levinson, *supra* note 19, at 140.

[21] 1 GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING § 1.13, at 1-25 (3d ed. Supp. 2014).

[22] *See* Robert J. Kutak, *Model Rules: Laws for Lawyers or Ethics for the Profession*, 38 REC. ASS'N B. CITY N.Y. 140, 142 (1983) (stating that the Commission proposed the Model Rules in light of criticism with the Model Code). The Model Code, which the ABA replaced with the Model Rules, was criticized as being irrelevant, ambiguous, and contradictory. *See id.* at 143; *see also* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212 (1982); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 702 (1977). The Model Code is composed of three parts: (1) canons—concise statements setting forth the basic duty of lawyers; (2) ethical considerations—statements of activity and conduct to which practitioners should aspire; and (3) disciplinary rules—statements setting forth minimum standards of conduct that must be met or a lawyer may be subject to disciplinary action. MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1980). The three parts of the Code are separate but interrelated, serving "both as an inspirational guide" and "as a basis for disciplinary action" when minimum standards are not met. *Id*.

[23] At the time the Model Code replaced the Canons, there was a consensus among the bar that the Canons were incomplete, unorganized, and failed to recognize the distinction between the inspirational and the proscriptive. *See* Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 5 (1970).

[24] The Canons of Professional Ethics were adopted by the ABA at is annual meeting on August 27, 1908. WILLIAM M. TRUMBULL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPONSIBILITY 373 (1957).

nonlawyer partnerships initially.[25] Rather, proscriptions against fee sharing and lawyer and nonlawyer associations arose in amendments to the Canons in 1928, through the addition of Canons 33 through 35.[26] Canon 33 prohibited partnerships between lawyers and nonlawyers if part of the business enterprise was the practice of law.[27] Canon 34 prohibited the division of legal fees with nonlawyers,[28] and Canon 35 cautioned lawyers not to be controlled by a lay entity that "intervenes between client and lawyer."[29] These prohibitions were carried over into the Model Code in 1969[30] and subsequently to the Model Rules in 1983.[31]

While proscriptions against fee sharing and lawyer and nonlawyer partnerships were adopted as part of the Model Rules in 1983,[32] a proposed version of Model Rule 5.4 would have allowed lawyers to share fees with nonlawyers, "so long as the nonlawyers agreed not to influence the lawyer's independent professional judgment and to abide by the rules of

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[25] Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 874 (1999).

[26] *Id.*

[27] Canon 33, titled "Partnerships—Names," provides as follows: "Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law." CANONS OF PROF'L ETHICS Canon 33 (1956).

[28] Canon 34, titled "Division of Fees," provides as follows: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service responsibility." *Id.* Canon 34.

[29] Canon 35, titled "Intermediaries," provides in part as follows:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

Id. Canon 35.

[30] MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102(A) (1969); *id.* DR 3-103(A); *id*. DR 5-107(B)–(C).

[31] MODEL RULES OF PROF'L CONDUCT R. 5.4 (2003).

[32] John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 97 (2000).

legal ethics regarding confidentiality, solicitation, and legal fees."[33] The Commission on Evaluation of Professional Standards, formulated by the ABA in 1977 and referred to as the "Kutak Commission,"[34] put forward a similar version of Model Rule 5.4 in 1982.[35] However, the ABA House of Delegates subsequently rejected this version in favor of a rule substantially similar to the one we have today.[36]

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[33] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-392 (1995).

[34] Charles M. Bennett, *Frontiers in Ethics: The Estate Lawyer's Duty of Loyalty and Confidentiality to the Fiduciary Client: Examining the Past to Make Wise Choices Now and in the Future*, 33 OHIO N.U. L. REV. 807, 807 (2007). The Commission on Evaluation of Professional Standards is referred to as the "Kutak Commission" because of its chairman, Robert J. Kutak. Bradley G. Johnson, Note, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 952, 959 (2000). He posited that the Model Rules define the law of lawyering and seek to guide the conscientious lawyer to balance competing duties in the professionally responsible representation of clients. *See* Robert J. Kutak, *The Law of Lawyering*, 22 WASHBURN L.J. 413, 418 (1983).

[35] The 1982 draft of Model Rule 5.4 provided as follows:

> *Professional Independence of a Firm*
>
> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:
>
> (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
>
> (b) information relating to the representation of a client is protected as required by Rule 1.6;
>
> (c) the arrangement does not involve advertising or personal contact with prospective clients prohibited by Rules 7.2 and 7.3; and
>
> (d) the arrangement does not result in charging a fee that violates Rule 1.5.

ISSUES PAPER, *supra* note 4, at 4–5.

[36] *Id.* at 5. Purportedly, the "'fear of Sears' . . . led to the defeat of the Kutak proposal; and Model Rule 5.4 was adopted instead." Michael Kelly, Comment, *Ethical Issues Associated with Multidisciplinary Practices in Texas*, 41 ST. MARY'S L.J. 733, 743 n.26 (2010) (quoting Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J.L. REFORM 95, 100 (2003)).

Model Rule 5.4 prohibits a lawyer from sharing a fee with a nonlawyer, except under limited circumstances.[37] It also prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.[38] It precludes a lawyer from practicing in a professional corporation or association if a nonlawyer is a corporate director or officer.[39] There is nothing in the rule that prohibits a lawyer from working with a professional trained in another discipline to assist with a client matter.[40] A lawyer may also directly employ a nonlawyer on the lawyer's staff, or own a separate business with a nonlawyer professional that provides nonlaw-related services to the client.[41] What is not permitted under Model Rule 5.4 is "an integrated practice in which a lawyer shares fees with a nonlawyer or enters into a partnership or an analogous relationship with a nonlawyer to deliver legal services to clients."[42]

III. THE MOVEMENT TO ESTABLISH MULTIDISCIPLINARY PRACTICE

During the 1990s, members of the legal profession noticed that consulting firms were soliciting clients and offering services quite similar to those traditionally offered by law firms.[43] Although quelled somewhat by accounting scandals that developed at the time,[44] some of the services

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[37] MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2003).

[38] *Id.*

[39] *Id.*

[40] *Background Paper*, *supra* note 13, at 6.

[41] *Id.*

[42] *Id.* The current version of Model Rule 5.4 is similar to the rule as originally promulgated in 1983. *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 401 (2014). The 2002 revisions to the Model Rules did little to change it. The revisions added subsection (a)(4), providing: "[A] lawyer may share court-awarded legal fees with a non-profit organization that employed, retained or recommended employment of the lawyer in the matter." MODEL RULES OF PROF'L CONDUCT R. 5.4(a)(4) (2002). The revisions also added language to subsection (d)(2), inserting the following: "or occupies the position of similar responsibility in any form of association other than a corporation." *Id.* R. 5.4(d)(2) (2002).

[43] *Background Paper*, *supra* note 13, at 1.

[44] *See* Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2206 (2010) (noting that the Enron scandal eliminated any possibility of a large-scale takeover of a law firm by a Big Five accounting firm); *see also* Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 486 (2002).

offered by these consulting firms were "advice on mergers and acquisitions, estate planning, human resources, and litigation support systems."[45] Furthermore, the largest consulting firms were affiliated with the largest accounting firms.[46]

In 1997, the ABA established the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) to study and evaluate the Model Rules of Professional Conduct.[47] As part of this movement, in August 1998, Philip S. Anderson, president of the ABA at the time,[48] appointed the Commission on Multidisciplinary Practice (MDP Commission) "to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public."[49] The concept of multidisciplinary practice (MDP) is not complicated; it envisions an integrated entity that provides legal services as one of several professional services offered through a single provider.[50] The MDP

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[45] *Background Paper*, *supra* note 13, at 1.

[46] *Id*.

[47] Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, SYLLABUS, Winter 2000, at 19, 19. Pursuant to recommendations of Ethics 2000, the Model Rules were extensively amended in February 2002. *See* ABA, EVALUATION OF RULES OF PROFESSIONAL CONDUCT (REPORT NO. 401) (Feb. 4–5, 2002), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics2000_report_hod_022002.authcheckdam.pdf. The Model Rules were subsequently amended in August 2002, upon further recommendation of Ethics 2000 and the Standing Committee on Ethics and Professional Responsibility. ABA CTR. FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE, at ii, 22 (2002), *available at* http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf. Additional revisions to the Model Rules were approved by the ABA House of Delegates in 2003. *2003 Annual Meeting*, ABA 12–13 (Aug. 2003), http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/2003journal.authcheckdam.pdf.

[48] ISSUES PAPER, *supra* note 4, at 5.

[49] *Id.* (quoting *Commission on Multidisciplinary Practice*, ABA CTR. FOR PROF. RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html (last visited Aug. 19, 2014)) (internal quotation marks omitted).

[50] Paton, *supra* note 44, at 2200. "Multidisciplinary practice" has been defined as a "partnership, professional corporation or other entity or arrangement, that includes lawyers and nonlawyers, and has as one, but not all, of its purposes the delivery of legal services to a client(s) . . . or that holds itself out to the public as proving nonlegal, as well as legal,

(*continued*)

Commission heard testimony and received comments on the issues it was asked to consider,[51] following which, in August 1999, it recommended that the Model Rules be amended to permit multidisciplinary practices, "but with certain safeguards in place to ensure that the core values of the legal profession were maintained."[52]

The ABA House of Delegates did not act on the MDP Commission's 1999 recommendation.[53] Rather, it resolved not to permit multidisciplinary practice "unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[54] In response to resolution by the ABA House of Delegates, the MDP Commission undertook an additional study, hearing more testimony and receiving more comments.[55] Consumer groups, business clients, and others "uniformly contended that the entry of a new, alternative provider of legal services was in the best interest of the

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services." *Report of the Commission on Multidisciplinary Practice*, ABA ANNUAL REPORT 226 (Aug. 1999) [hereinafter *1999 Report of the Commission*].

[51] The MDP Commission was asked to analyze the following:

> • The experience of clients, foreign and domestic, who had received legal services from professional service firms, and report on international trade developments relevant to the issue;
>
> • Existing state and federal legislative frameworks within which professional service firms were providing legal services, and recommend any modifications or additions to that framework that would be in the public interest;
>
> • The impact of receiving legal services from professional service firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and
>
> • The application of current ethical rules and principles to the provision of legal services by professional service firms, and to recommend any modifications or additions that would serve the public interest.

ISSUES PAPER, *supra* note 4, at 5.

[52] *Id.* at 6; *1999 Report of the Commission*, *supra* note 50, at 223.

[53] *See* ISSUES PAPER, *supra* note 4, at 6.

[54] *Id*.

[55] *Id.*

public."[56] This resulted in the issuance of a new report in 2000, again recommending multidisciplinary practice, but only for lawyer-controlled practices.[57] The MDP Commission recommended that "[l]awyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services ([m]ultidisciplinary [p]ractice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services."[58]

In July 2000, the ABA House of Delegates rejected the recommendation in the MDP Commission's new report, despite "overwhelmingly positive response from clients and the public."[59] In fact, a vote on this MDP Commission recommendation "never made it to the floor of the House of Delegates."[60] Instead, the ABA House of Delegates passed a resolution discharging the MDP Commission with thanks and urging the legal profession to protect its "core values" by continuing to prohibit nonlawyers from sharing legal fees, forming partnerships with lawyers for purposes of practicing law, or owning any interests in law firms.[61] The ABA also instructed its Standing Committee on Ethics and Professional Responsibility to do the following:

> [R]ecommend to the House of Delegates such amendments to the [Model Rules] as are necessary to assure that there are safeguards in the [Model Rules] relating to strategic alliances and other contractual relationships with nonlegal professional service providers

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[56] Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 274–75 (2000).

[57] *Report of the Commission on Multidisciplinary Practice*, ABA ANNUAL REPORT 183 (July 2000) [hereinafter *2000 Report of the Commission*]; *see* ISSUES PAPER, *supra* note 4, at 6.

[58] *2000 Report of the Commission*, *supra* note 57, at 183.

[59] Paton, *supra* note 44, at 2209.

[60] *Id.*

[61] *Proceedings for the Annual Meeting of the House of Delegates*, ABA ANNUAL REPORT 24 (July 2000) [hereinafter *Proceedings for the Annual Meeting*]; *see* Paton, *supra* note 44, at 2209–10.

> consistent with the statement of principles in this [r]ecommendation.[62]

Following its charge by the ABA House of Delegates, the ABA Standing Committee on Ethics and Professional Responsibility proposed Report 113 to the ABA House of Delegates at the ABA's annual meeting

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[62] *Proceedings for the Annual Meeting*, *supra* note 61, at 25. The principles to which the recommendation referred are as follows:

> 1. It is in the public interest to preserve the core values of the legal profession, among which are:
>
> a. the lawyer's duty of undivided loyalty to the client;
>
> b. the lawyer's duty competently to exercise independent legal judgment for the benefit of the client;
>
> c. the lawyer's duty to hold client confidences inviolate;
>
> d. the lawyer's duty to avoid conflicts of interest with the client;
>
> e. the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice; and
>
> f. The lawyer's duty to promote access to justice.
>
> 2. All lawyers are members of one profession subject in each jurisdiction to the law governing lawyers.
>
> 3. The law governing lawyers was developed to protect the public interest and to preserve the core values of the legal profession, that are essential to the proper functioning of the American justice system.
>
> 4. State and territorial bar associations and other entities charged with attorney discipline should reaffirm their commitment to enforcing vigorously their respective law governing lawyers.
>
> 5. Each jurisdiction should reevaluate and refine to the extent necessary the definition of the "practice of law."
>
> 6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.
>
> 7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
>
> 8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.

Id. at 25–26.

in 2001.[63] Report 113 suggested amendments to the Model Rules, providing guidance, as well as warnings, to lawyers who participate in strategic alliances.[64] As something distinct from multidisciplinary practice, the Standing Committee on Ethics and Professional Responsibility's proposal expressly allowed lawyers to engage in "'strategic alliances,' or mutual referral arrangements with nonlawyers."[65]

After further consideration and review of the matter of strategic alliances, the ABA House of Delegates adopted modifications to the Model Rules in August 2002, expressly authorizing "reciprocal referral agreements between lawyers and nonlawyer professionals, as well as between lawyers."[66] To promote the lawyer's independent professional

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[63] *Report of the Standing Committee on Ethics and Professional Responsibility*, ABA ANNUAL REPORT 125 (Aug. 2002) [hereinafter *2002 Report of the Standing Committee*].

[64] *See Report of the Standing Committee on Ethics and Professional Responsibility*, ABA ANNUAL REPORT 171 (Aug. 2001) [hereinafter *2001 Report of the Standing Committee*]. Amendments to the comments of Model Rule 1.7 and to Model Rule 7.2 and its commentary were suggested. *Id.* at 171–72, 174–75.

[65] *ABA Stands Firm on Client Confidentiality, Rejects 'Screening' for Conflicts of Interest*, 17 ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT 492, 494 (2001); *2001 Report of the Standing Committee*, *supra* note 64, at 175. The Standing Committee on Ethics and Professional Responsibility removed its proposal from debate, however, in response to a request from members of the New York bar. *2002 Report of the Standing Committee*, *supra* note 63, at 125. The New York State Bar Association filed a last-minute report recommending a proposed Rule 5.8 that addressed contractual relationships between nonlegal professionals and lawyers. *Id.* at 127–28. This recommendation reflected rule changes that had been adopted in New York allowing lawyers to engage in limited types of cooperative alliances with nonlawyers. *Id.* at 125. This change sprang from a 388-page study in April 2000 entitled "Preserving the Core Values of the American Legal Profession." Laura Noroski, Note, *New York's Controversial Ethics Code Changes: An Attempt to Fit Multidisciplinary Practice Within Existing Ethical Boundaries*, 76 S. CAL. L. REV. 483, 495 (2003). Known as the MacCrate Report, after the chair of New York's Special Committee on the Law Governing Firm Structure and Operation, it concluded that "'[m]ultidisciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession.'" *Id.* (quoting Chris Kelleher, *MDP Update: The Empire Strikes Back*, CPA J., Oct. 2001, at 12, 12). While the MacCrate Report condemned partnerships between lawyers and nonlawyers, it viewed "side-by-side" business arrangements favorably. *Id.* This was the basis for the New York rule amendments that took effect November 1, 2001, permitting and regulating cooperative business relationships between lawyers and nonlawyers. *Id*. at 495–96.

[66] *ABA Delegates Approve Full MJP Package with Little More than Scattered Opposition*, 18 ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT 477, 479 (2002) (*continued*)

judgment, Model Rule 7.2[67] was amended to prohibit arrangements of this nature that are exclusive, so "that lawyers remain free to make a referral

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[hereinafter *ABA Delegates Approve Full MJP Package*]; *see Proceedings of the 2002 Annual Meeting of the House of Delegates*, ABA ANNUAL REPORT 49 (Aug. 2002) [hereinafter *Proceedings of the 2002 Annual Meeting*]. According to M. Peter Moser, the amendment extends beyond agreements with nonlawyer professions to embrace strategic alliances with other lawyers to clarify that referral arrangements among lawyers and law firms are subject to the requirement of client knowledge. *Id.*

[67] Model Rule 7.2(b)(4) provides as follows:

> (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
>
> . . . .
>
> (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
>
> (i) the reciprocal referral agreement is not exclusive, and
>
> (ii) the client is informed of the existence and nature of the agreement.

MODEL RULES OF PROF'L CONDUCT R. 7.2(b)(4) (2002). Added to the commentary of Model Rule 7.2 was the following new comment:

> A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such agreements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Id. R. 7.2(b)(4) cmt. 8.

based on what is best for the particular client."[68] Also, the rule provided that referral arrangements must be disclosed to the client, so the client can make a well-informed decision on whether to accept the referral, protecting the core value of informed client consent.[69] Addressing fee structure, revised Model Rule 5.4 stated that a lawyer is precluded from paying a fee to a lawyer or to a nonlawyer solely for a referral,[70] tying the division of fees with a referring lawyer to the mandates of Model Rule 1.5(e).[71] By leaving Model Rule 5.4 essentially intact, the Model Rules "effectively ban[ned] MDPs with provisions designed to prevent or limit the influence by non-lawyer third parties."[72] Fee sharing with nonlawyers,[73] partnerships with nonlawyers,[74] and the practice of law in a professional corporation, if an interest was owned by a nonlawyer, was prohibited.[75] By doing this, the Model Rules attempted "to prevent a lawyer from being pressured by a non-lawyer to violate ethical duties, since non-lawyers 'are not subject to the same ethical mandates regarding independence, conflicts

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[68] *ABA Delegates Approve Full MJP Package*, *supra* note 66, at 479. ABA Standing Committee on Ethics and Professional Responsibility member Thomas M. Fitzpatrick emphasized the need to promote and protect the legal profession's "core values" of independent judgment and informed client consent. *Proceedings of the 2002 Annual Meeting*, *supra* note 66, at 48.

[69] *Proceedings of the 2002 Annual Meeting*, *supra* note 66, at 48.

[70] MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (2002).

[71] *Id.* R. 5.4 cmt. 8. Model Rule 1.5(e) provides:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

Id. R. 1.5(e) (2013).

[72] Noroski, *supra* note 65, at 510 (quoting Katherine L. Harrison, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879, 882 (2000)) (internal quotation marks omitted).

[73] MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2013).

[74] *Id.* R. 5.4(b).

[75] *Id.* R. 5.4(d)(1).

of interest, fees and the other important provisions of the [legal] profession's code of conduct.'"[76]

The rules that govern the conduct of lawyers in the United States are determined by each individual state.[77] During the 1990s, the only U.S. jurisdiction to amend Rule 5.4 to allow lawyer and nonlawyer partnerships, as well as the sharing of fees, was the District of Columbia.[78] In the District of Columbia, Rule 5.4 was modified to permit partnership and fee sharing with nonlawyers, although this arrangement was restricted to organizations that provide legal services to clients as their sole purpose.[79] The D.C. rule did not permit a lawyer and nonlawyer to enter into a partnership if a purpose of the organization was to provide nonlegal services as well,[80] something envisioned in the multidisciplinary practice concept.[81]

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[76] Noroski, *supra* note 65, at 510 (quoting Harrison, *supra* note 72, at 884).

[77] *See* Stephen Rubin, *The Legal Web of Professional Regulation*, *in* REGULATING THE PROFESSIONS: A PUBLIC POLICY SYMPOSIUM 29, 31–32 (Roger D. Blair & Stephen Rubin eds., 1980).

[78] *Background Paper*, *supra* note 13, at 6; Elijah D. Farrell, Note, *Accounting Firms and the Unauthorized Practice of Law: Who Is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 602–03 (2000).

[79] D.C. Rule 5.4(b) provides:

> (b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
>
> (1) the partnership or organization has as its sole purpose providing legal services to clients;
>
> (2) all persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
>
> (3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
>
> (4) the foregoing conditions are set forth in writing.

D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (1991).

[80] *See id.* R. 5.4(b)(1). Comment 7 to D.C. Rule 5.4 provides as follows:

> As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the rules regarding the possession of a financial

(*continued*)

The purpose of liberalizing Rule 5.4 in the District of Columbia was to "permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of employee."[82] However, as far as implementation of the rule was concerned, very few law firms in Washington, D.C. were quick to take on nonlawyer partners.[83] It has been suggested that two factors may have contributed to this fact. One is the requirement that the law firm have the provision of legal services as its "sole purpose."[84] The second factor is an ABA ethics opinion concluding that law firms "with offices in more than one jurisdiction could not have a nonlawyer partner in its Washington, D.C. office."[85]

> interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the Rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

Id. R. 5.4 cmt. 7.

[81] *See 1999 Report of the Commission*, *supra* note 50, at 226.

[82] D.C. RULES OF PROF'L CONDUCT R. 5.4 cmt. 7 (1991).

[83] *Background Paper*, *supra* note 13, at 7.

[84] *Id.* (attributing remarks to Susan Gilbert, Ethics Counsel for the District of Columbia Bar Association).

[85] *Id.*; *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-360 (1991). Rather than take on nonlawyer partners, some Washington, D.C. firms instead formed innovative relationships. *See* Phillippa Cannon, *The Big Six Move In*, INT'L FIN. L. REV., Nov. 1997, at 25, 26. In 1997, PricewaterhouseCoopers and Miller & Chevalier, a Washington, D.C. firm with a specialized tax practice, announced a strategic alliance between the two. *See id.* at 25. In 1999, five partners from the Atlanta and Washington, D.C. offices of King & Spalding broke away from the firm and formed a separate firm in Washington named McKee Nelson Ernst & Young. *See What Kind of Firm Is McKee Nelson Ernst & Young?*, 16 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 66, 66 (2000). The lawyers entered into a relationship with Ernst & Young, whereby Ernst & (*continued*)

To date, the District of Columbia remains the only U.S. jurisdiction to permit law practices with lawyer and nonlawyer partners and the sharing of fees.[86] However, in March 2011, legislation was introduced in North Carolina to permit nonlawyers to own an equity interest in incorporated law firms.[87] Under the North Carolina scheme, lawyer shareholders are required to own at least 51% of the stock of the professional corporation rendering services. Nonlawyer shareholders are precluded from interfering "with the exercise of professional judgment by licensed attorneys in their representation of clients."[88] Should a conflict arise between duties to the

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Young furnished start-up capital for the firm and leased the firm space in a building it owned. *See id.*

[86] ISSUES PAPER, *supra* note 4, at 2.

[87] *Id.*; *An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements*, S. 254, 2011–2012 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S254v0.pdf (unenacted).

[88] N.C. S. 254. As rewritten, the North Carolina statute would state:

> Law Firms. – Any person may own up to forty-nine percent (49%) of the stock of a professional corporation rendering services under Chapter 84 of the General Statutes, subject to the following requirements:
>
> (1) Licensees continue to own and control voting stock that represents at least fifty-one (51%) of the votes entitled to be cast in the election of directors of the professional corporation.
>
> (2) All licensees who perform professional services on behalf of the corporation comply with Chapter 84 of the General Statutes and the rules adopted thereunder.
>
> (3) The stock certificates or other written evidence of ownership of any nonlicensee shall bear the following language, in at least 12-point type:
>
> "No nonlicensee shareholder shall interfere with the exercise of professional judgment by licensed attorneys in their representation of clients. If there is an inconsistency or conflict between the duties to the court, to clients, and to shareholders, then that conflict or inconsistency shall be resolved as follows:
>
> 1. The duty to the Court shall prevail over all other duties.
>
> 2. The duty to the client shall prevail over the duty to shareholders."

(*continued*)

court, clients, and shareholders, the duty to the court prevails,[89] with the duty to clients coming next,[90] followed by the duty to shareholders.[91]

IV. MULTIDISCIPLINARY PRACTICES ABROAD

In light of Ethics 20/20's treatment of multidisciplinary practice at the turn of the twenty-first century, few U.S. jurisdictions pursued this course, or any other form of alternative business structures.[92] However, this was not the case in the global legal services marketplace.[93] The legal profession in a number of other countries studied, and subsequently embraced, a variety of alternative business structures.[94] One of the first of these was Australia.

A. Australia

The movement toward alternative business structures in law practice began in Australia in 1994, when legislation in New South Wales authorized multidisciplinary partnerships.[95] To ensure compliance with a law firm's ethical practices, the legislation provided that legal practitioners

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> (4) Shareholders who hold or control less than five percent (5%) of the voting stock and who are not employees, directors, or officers of the professional corporation shall not, solely as a result of stock ownership, be relevant for a determination of conflict of interest under Chapter 84 of the General Statutes or the rules adopted for the regulation of the professional conduct of licensees.
>
> (5) A qualified retirement or employee stock ownership plan is deemed to be a licensee for purposes of this section if the majority of the trustees of the plan are licensees.

N.C. GEN. STAT. § 55B-6(a2).

[89] *Id.* § 55B-6(a2)(3).

[90] *Id.*

[91] *Id.* This hierarchy of fealty is similar to what is followed in Australia for incorporated legal practices; there, the duty to the court is primary, followed by an obligation to clients, and finally, to shareholders. ISSUES PAPER, *supra* note 4, at 9.

[92] ISSUES PAPER, *supra* note 4, at 2.

[93] *Id.* at 7.

[94] Among the countries that have implemented alternative business structures for law practice are Australia, Canada, England and Wales, France, Germany, the Netherlands, Scotland, Spain, and New Zealand. *Id.* at 15–16; Kelly, *supra* note 36, at 746.

[95] ISSUES PAPER, *supra* note 4, at 8.

were to retain at least 51% of the net partnership income.[96] This 51% rule subsequently came under attack, with "pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection."[97] The end result was the recognition of "incorporated legal practices, multidisciplinary practices, and nonlawyer investment in law firm entities, including the first initial public offering of shares in a law firm."[98] These developments "coincided with the effective end of self-regulation by the legal profession, replaced by a coregulatory system that separates regulatory from representative functions, and legislation that places increased responsibility in the hands of government or government agencies."[99]

In Australia, an incorporated legal practice "may provide legal and any other lawful service, except it may not operate a managed investment scheme."[100] It may "have external investors and be listed on the Australian Stock Exchange," and each lawyer who is a legal practitioner must comply with all rules and regulations that govern the legal profession.[101] The incorporated legal practice must also comply with the Australian Federal Corporations Act, which "include[s] registration with the Australian Securities & Investment Commission."[102] Due to these multiple obligations, some issues of fealty arose. In Australia, a corporation's primary duty is to its shareholders,[103] whereas a lawyer's professional duty "is owed first to the court and then to the client."[104] Slater & Gordon, "the world's first publicly listed law firm,"[105] was careful to provide that, as an incorporated legal practice, "its duty to the court remained primary, that

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[96] *Id.*

[97] *Id.*

[98] Paton, *supra* note 44, at 2240–41. Each state or territory in Australia has its own regulatory structure, and those structures vary from jurisdiction to jurisdiction. *Id.* at 2241. "[I]ncorporated legal practices are permitted under national model laws, as well as in New South Wales, the Northern Territory, Queensland, and Western Australia." *Id.*

[99] *Id.* at 2241.

[100] ISSUES PAPER, *supra* note 4, at 9 (internal quotation marks omitted) (citing *Legal Profession Act 2004* (NSW) s 135 (Austl.), *available at* http://www.legislation.nsw.gov.au/maintop/view/inforce/act+112+2004+cd+0+N).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

duties to its clients followed, and that the firm's obligations to shareholders were last."[106]

A multidisciplinary partnership, as defined by Australia's Legal Profession Act 2004, is "a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services."[107] "Each lawyer partner is responsible for . . . the legal services provided by the partnership" and to see that there is compliance with the rules and regulations that govern the legal profession.[108] Furthermore, an Australian legal practitioner can be prohibited from partnering with a nonlawyer who is "not a 'fit and proper person' to be a partner or has committed conduct that, if committed by an Australian legal professional, would violate applicable professional conduct rules."[109]

At the present time, Australia "is aggressively investigating how regulatory frameworks can further be adjusted to ensure that Australian lawyers are poised to compete both from domestic bases and abroad."[110] Legal services are "making an enormous contribution to Australia's economy" both nationally and internationally, "particularly in Asian markets, China and Hong Kong." [111] One commentator has noted:

> The fact that the profession is working with government to ensure that ethical considerations are addressed within these new regulatory frameworks is evidence that the simple adoption of an alternative approach to the delivery mode for legal services does not alone mean the

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[106] *Id.*

[107] *Legal Profession Act 2004* (NSW) s 165(1) (Austl.), *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s165.html.

[108] ISSUES PAPER, *supra* note 4, at 10 (citing *Legal Profession Act 2004* (NSW) s 168 (Austl.), *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s168.html).

[109] *Id.* (quoting *Legal Profession Act 2004* (NSW) s 179 (Austl.), *available at* http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s179.html).

[110] Paton, *supra* note 44, at 2242. "Uniform legislation and an integrated regulatory framework are being sought to 'move toward[] a more functional and efficient Australian legal services market.'" *Id.* at 2241 (quoting John Corcoran, President, Law Council of Austl., The State of the Profession 3 (Sept. 19, 2009) (transcript available at http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20090919TheStateoftheProfession.pdf)).

[111] *Id.* at 2242.

abandonment of "core values," as the MDP debate in North America ten years ago suggested.[112]

B. Canada

In Canada, multidisciplinary practices are allowed in three provinces: British Columbia, Ontario, and Quebec.[113] The road taken to arrive at this position on multidisciplinary practice has been described as one "involving political intrigue and overt manipulation."[114] The Canadian Bar Association (CBA), whose "primary purpose is to promote the interest of its members,"[115] established the International Practice of Law (IPL) Committee in 1997 "to monitor the 'activities, negotiations[,] and developments regarding the globalization of legal practice and the trend toward[] multi-disciplinary practices through NAFTA, the World Trade Organization . . . , and the International Bar Association.'"[116]

Pursuant thereto, a 1998 IPL committee report asserted that, "unless [multidisciplinary practice organizations] were controlled by lawyers," they should not be permitted to provide legal services to clients.[117] Following this, in May 1999, the Law Society of Upper Canada (LSUC) "imposed a regime for the province of Ontario that regulated the MDP structure and restricted lawyer participation to those [MDPs] in which legal services were the primary service offering."[118] However,

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[112] *Id.* (internal quotation marks omitted).

[113] ISSUES PAPER, *supra* note 4, at 11.

[114] Paton, *supra* note 44, at 2211. This notwithstanding, the Canadian Bar Association "is viewed as an 'important and objective voice on issues of significance to both the legal profession and the public' and is generally respected by [the] government for its input, although its resolutions are not binding on government or any legal regulator." *Id.* (footnote omitted) (quoting *About the Canadian Bar Association*, CANADIAN BAR ASS'N, http://www.cba.org/CBA/Info/Main (last visited Aug. 19, 2014)).

[115] *Id.*

[116] *Id.* at 2212 (quoting INT'L PRACTICE OF LAW COMM., CANADIAN BAR ASS'N, STRIKING A BALANCE: THE REPORT OF THE INTERNATIONAL PRACTICE OF LAW COMMITTEE ON MULTI-DISCIPLINARY PRACTICES AND THE LEGAL PROFESSION 13 (1999) [hereinafter STRIKING A BALANCE], *available at* http://www.cba.org/cba/pubs/pdf/mdps.pdf).

[117] *Id.*

[118] *Id.* at 2213. The LSUC began its work on multidisciplinary practice in 1997, when the "Futures Task Force" was created "in response to deliberations within two separate Law Society committees on the need to assess the regulation of its members." *Id.* at 2216. The regulation of multidisciplinary practices in Ontario was ultimately made up of two Law Society By-Laws: By-Law 25, adopted April 1999, addressing integrated partnership

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"purportedly acting in the public interest,"[119] the IPL committee revised its view in 1999 and, in a move noted as "embarrassing to the [LSUC],"[120] recommended that lawyers be allowed to participate in multidisciplinary practices, even if such practices were not controlled by lawyers and were not limited to those of a "legal nature."[121]

In August 2000, the CBA ultimately passed a resolution that recommended "provincial regulators adopt rules permitting lawyers to join [multidisciplinary practices] and share fees with nonlawyers."[122] While the resolution called for lawyers to have control of the "delivery of legal services" in multidisciplinary practices,[123] there was no "requirement that lawyers have financial or voting control of the [multidisciplinary practices] themselves,"[124] something strenuously objected to by the Ontario delegates.[125] In response to this action, "LSUC representatives embarked on an ultimately successful campaign through the legal press and at the CBA itself to have the will of the CBA national council reversed and a narrower MDP regime with a lawyer-control requirement adopted."[126] To this end, "[i]n February 2001, the CBA Council adopted a resolution that 'clarified' and amended the August 2000 resolution to require lawyers to have 'effective control' over the entire MDP."[127]

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arrangements; and By-Law 32, adopted May 2001, addressing affiliation arrangements between law firms and other service providers. *Id.* at 2216–17, 2220–21.

[119] *Id.* at 2211 (internal quotation marks omitted).

[120] *Id.* at 2213.

[121] *Id.* (citing STRIKING A BALANCE, *supra* note 116, at 11). The "balance" in the title of the report referred to striking a balance between "two sets of public interests," which were: "the preservation of lawyers' role in the administration of justice"; and "freedom of choice, freedom of association, competition and efficiency." *Id*. (quoting STRIKING A BALANCE, *supra* note 116, at 5). "The report suggested that the adoption of a more restrictive regime contradicted what the IPL Committee saw as more important public interests and values." *Id*. (quoting STRIKING A BALANCE, *supra* note 116, at 5).

[122] *Id.* at 2214.

[123] *Id.*

[124] *Id.*; *see* Comm'n on Multidisciplinary Practice, *Canadian Bar Association Resolution 00-3-A*, ABA, http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_canadian_res.html (last visited Aug. 19, 2014).

[125] Paton, *supra* note 44, at 2214.

[126] *Id.* at 2211.

[127] *Id.* at 2215 (citing CANADIAN BAR ASS'N, CBA CODE OF CONDUCT RESOLUTIONS, Res. 01-01-M, at 34–35 (2000), *available at* https://www.cba.org/CBA/epiigram/february2002/resolutions.pdf). "Effective control would ensure that the business and

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While multidisciplinary practices have been permitted in Ontario since 1999,[128] it was not until 2010 that they were permitted in British Columbia and Quebec.[129] The regime in British Columbia is similar to that in Ontario, whereas the regime in Quebec is significantly more liberal.[130] At the turn of the twenty-first century, multidisciplinary practice was discussed in British Columbia, where implementation of the measure was unsuccessfully put to a vote.[131] The reasons offered for rejection of multidisciplinary practice at that time were the protection of "core values of the profession" and "lack of demand within the profession for such a regulatory scheme."[132] However, the mood shifted and, in 2010, multidisciplinary practice was implemented in British Columbia, calling for lawyers involved in multidisciplinary partnerships to have effective control over the legal services provided,[133] and for nonlawyer partners only to provide services to the public if they "support or supplement the practice of law by the MDP."[134]

Quebec's 2010 multidisciplinary practice rules were less restrictive than the multidisciplinary practice regime found in Ontario and British Columbia, representing "a far more liberal multidisciplinary practice regime, requiring simple majority ownership by members of the Barreau du Quebec of the firm through which the professional services are

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practice of the MDP would be in continuing compliance with the core values, ethical and statutory obligations, standards and rules of professional conduct of the legal profession." *Id.* (citations omitted) (internal quotation marks omitted). Over time, By-Law 25 was amended four times and then revoked, in May 2007, "as part of housekeeping amendments necessitated by the October 2006 amendments to the Law Society Act." *Id.* at 2217 n.106 (citing KATHERINE CORRICK, LAW SOC'Y OF CAN., REPORT TO CONVOCATION 16 (2007)).

[128] ISSUES PAPER, *supra* note 4, at 11.

[129] *Id.*

[130] *See id.* at 11–12.

[131] *See* Paton, *supra* note 44, at 2225. Proposed changes that would have implemented a multidisciplinary practice rule in British Columbia received a majority vote in December 2001 (fourteen to thirteen of those present and voting), however, a two-thirds majority was required for the new rules to be implemented. *Id.* The 2001 proposed changes were liberal and would have been "radically different from the restrictive regulatory framework adopted in Ontario." *Id.* at 2223.

[132] *Id.* at 2225 (quoting Law Soc'y of B.C., *Benchers Say No to Multi-Disciplinary Practice*, BENCHERS' BULL. (Nov.–Dec. 2001), https://www.lawsociety.bc.ca/page.cfm?cid=1854&t=Benchers-say-no-to-multi-disciplinary-practice).

[133] *See* ISSUES PAPER, *supra* note 4, at 11.

[134] *Id*. (quoting LAW SOC'Y RULES R. 2-23.3(2)(a)(i) (2014), *available at* http://www.lawsociety.bc.ca/page.cfm?cid=979) (internal quotation marks omitted).

provided."[135] Nonlawyer members of the multidisciplinary practices must be members of designated "recognized professional bodies,"[136] but "the regulation does not require that their activities 'support or supplement the practice of law' in the manner of the Ontario and British Columbia MDP rules."[137] Firms in Quebec must, however, ensure that all members of the partnership comply with rules of law that permit lawyers to carry out their professional activities, such as those relating to professional secrecy, confidentiality of information, professional independence, and conflicts of interest.[138]

C. England and Wales

At the beginning of the twenty-first century, the legal profession in England and Wales was essentially regulated by the Law Society of England and Wales, representing solicitors, and the Bar Council, representing barristers.[139] Historically, the legal profession was opposed to multidisciplinary practices, but, in 1996, the Law Society "abandoned its traditional opposition to" MDPs and, in 1998, "considered different ways to facilitate MDPs while maintaining adequate regulatory supervision."[140]

> [The Law Society] obliquely acknowledged political pressure to open the field to MDPs, with a representative noting that part of the "Law Society's intention in continuing to consult on the subject of multi-disciplinary practice is to be in a position to avoid the imposition of

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[135] *Id.* at 12.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 13.

[139] *See* Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 186 (1994). The legal profession in England and Wales recognizes the two branches of barrister and solicitor. *See* Louise L. Hill, *Publicity Rules of the Legal Professions Within the United Kingdom*, 20 ARIZ. J. INT'L & COMP. L. 323, 335 (2003). The primary role of barristers is to advocate. Schwarzschild, *supra*, at 186. Before the Court and Legal Services Act of 1990, barristers had the sole right to practice before the trial courts of general jurisdiction and the appellate courts in England and Wales. *See id.* The primary role of solicitors is to draft documents, advise clients, and negotiate. *Id.* Under the Legal Services Act, "while barristers' rights of audience remained untouched, solicitors satisfying special education and training requirements could obtain advocacy rights in the higher courts." Hill, *supra*, at 338. The act also allowed barristers to contract directly with clients. Schwarzschild, *supra*, at 224.

[140] Paton, *supra* note 44, at 2233.

> what might be an unsatisfactory regime should any part of [g]overnment decide to take action."[141]

The Law Society agreed to support multidisciplinary practice in 1999 and, subsequently, two interim models were put forward, with the "linked partnership" model being approved in 2000.[142] Under the linked partnership model, nonsolicitors could "become partners in a law firm, so long as the firm's business remained the provision of legal and ancillary services."[143]

During this period, the Office of Fair Trading (OFT), the United Kingdom's authority on competition and antitrust,[144] "concluded that restrictions that barred MDPs were unreasonable market restraints that gave rise to inflationary pricing and resulted in an anticompetitive practice in the United Kingdom's main commercial professions."[145] In 2001, the OFT indicated that, if the legal regulators "did not change rules to accommodate [multidisciplinary practice], then the government would do so for it."[146] In fact, that is exactly what happened. Within the legal profession, implementation of multidisciplinary practice rules was delayed by divisions between barristers and solicitors.[147] Barristers campaigned to forestall the changes,[148] while solicitors sought "parliamentary time needed to implement a mixed-partnership model."[149] Although the legal regulators

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[141] *Id.* (quoting Alison Crawley, *Solicitors, Accountants and Multi-Disciplinary Practice: The English Perspective*, CTR. FOR PROF'L RESPONSIBILITY, http://www.abanet.org/cpr/mdp/crawley.html (last visited Aug. 19, 2014)).

[142] *Id.* at 2233–34. The two models put forward by the Law Society as interim steps were the "linked partnership" model and the "legal practice plus" model. *Id.* at 2234. The legal practice-plus model allowed a solicitor firm to have nonsolicitor partners, but "the main business of which must be the provision of legal and ancillary services." *Id.* Under the linked partnership model, fee-sharing agreements between the law firm and other businesses were permitted, although control had to be retained by solicitors. *Id.* at 2234–35.

[143] *Id.* at 2234 (citing *Law Society to Push MDPs Through Early*, LAWYER (Nov. 13, 2000), http://www.thelawyer.com/law-society-to-push-mdps-through-early/102942.article).

[144] *Id.* at 2233.

[145] *Id.*

[146] *Id.* at 2232.

[147] *Id.* at 2235.

[148] *Id.*

[149] *Id.* (citation omitted) (internal quotation marks omitted). The Bar Council opposed partnerships between barristers and nonlawyers, among its concerns were matters relating to conflict of interest and that consumer choice in advocacy would be limited. Aubrey

(*continued*)

were making "steps toward[] accommodating change, change did not come quickly enough,"[150] resulting in the adoption of the Legal Services Act (LSA) in 2007, effectively ending self-regulation of the legal profession in England and Wales.[151]

The LSA established a new Legal Services Board "to serve as a 'single, independent[,] and publicly accountable regulator with the power to enforce high standards in the legal sector, replacing the maze of regulators with overlapping powers'" in England and Wales.[152] Under the LSA, alternative business structures for the delivery of legal services by lawyers and nonlawyers are specifically authorized.[153] Regulatory objectives[154] for the regulation of all legal services are set forth, with "consumer welfare and the public interest as preeminent concerns."[155]

Pursuant to its authority under the LSA, the Legal Services Board designated the Solicitors Regulation Authority as an approved regulator of alternative business structures, which are permitted to have lawyer and

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Meachum Connatser, Comment, *Multidisciplinary Partnerships in the United States and the United Kingdom and Their Effect on International Business Litigation*, 36 TEX. INT'L L.J. 365, 384 (2001).

[150] Paton, *supra* note 44, at 2232.

[151] *Id.* at 2236. The path of the act through the House of Commons and the House of Lords has been described as "tortuous." *Id.* at 2239.

[152] *Id.* at 2236 (quoting *Legal Services Act Given Royal Assent*, MINISTRY OF JUST. (Oct. 30, 2007), http://archive.is/S1MdY).

[153] Legal Services Act 2007, c. 29, § 111 (U.K), *available at* http://www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf; *see* Paton, *supra* note 44, at 2236.

[154] The LSA states the following regulatory objectives:

> (a) protecting and promoting the public interest;
>
> (b) supporting the constitutional principle of the rule of law;
>
> (c) improving access to justice;
>
> (d) protecting and promoting the interests of consumers;
>
> (e) promoting competition in the provision of services within subsection (2);
>
> (f) encouraging an independent, strong, diverse and effective legal profession;
>
> (g) increasing public understanding of the citizen's legal rights and duties;
>
> (h) promoting and maintaining adherence to the professional principles.

Legal Services Act 2007, c. 29, § 1(1).

[155] Paton, *supra* note 44, at 2236.

nonlawyer owners and managers and may provide only legal services, or legal services along with nonlegal services.[156] These entities must be licensed and nonlawyer owners and managers are subject to a "fit to own" test.[157] For instance, firms can be licensed as "legal disciplinary practices," which only engage in legal practice but may be managed by nonlawyers, along with barristers and solicitors.[158] While outside ownership is not permitted in legal disciplinary practices,[159] an alternative business structure may have external investors, although there are limitations and requirements associated with outside owners.[160] Commentators have asserted that these alternative practice structures will give English firms a competitive advantage over firms in the United States as they compete in the market of global financial services.[161] What has been created is "a regulatory landscape that will give law firms in London 'individually, and the English legal profession collectively, a hitherto unimaginable competitive advantage.'"[162]

V. RECENT ABA EXAMINATION OF ALTERNATIVE BUSINESS STRUCTURES

In 2009, the ABA created the Commission on Ethics 20/20 "to tackle the ethical and regulatory challenges and opportunities arising from [twenty-first] century" social change and the evolution of law practice.[163] Carolyn B. Lamm, president of the ABA at the time,[164] "charged the Commission with conducting a plenary assessment of the ABA Model Rules of Professional Conduct and related ABA policies, and directed it to follow these principles: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession."[165] As part of this

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[156] ISSUES PAPER, *supra* note 4, at 13.

[157] *Id.*

[158] *Id.* at 14. In legal disciplinary practices, nonlawyer management may not exceed 25%. *Id.*

[159] *Id.*

[160] *Id.*

[161] *See* Paton, *supra* note 44, at 2240.

[162] *Id.* (quoting Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, PROF. LAW., 2009, at 1, 9).

[163] ETHICS 20/20, *supra* note 2, at 1; *see also* Louise L. Hill, *Technology—A Motivation Behind Recent Model Rule Revisions*, 40 N. KY. L. REV. 315, 315 (2013).

[164] ETHICS 20/20, *supra* note 2, at 1.

[165] *Id.*

assessment, aware that "U.S. lawyers and law firms are increasingly doing business abroad or affiliating with non-U.S. firms that have different business structures than their own firms,"[166] Ethics 20/20 "decided to study whether U.S. lawyers and law firms should also be permitted to employ alternative law practice structures in which nonlawyers have an ownership interest."[167] Included in Ethics 20/20's November 2009 Preliminary Issues Outline was consideration of how "core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures."[168] The Working Group on Alternative Business Structures, formed to examine and study these matters,[169] heard evidence indicating that "small firms in particular, are increasingly interested in having nonlawyer partners."[170] Examples of law firms likely to take advantage of such arrangements were noted:

> [L]aw firms that focus their practice on land use planning with engineers and architects; law firms with intellectual property practices with scientists and engineers; family law firms with social workers and financial planners on the client service team; and personal injury law firms with nurses and investigators participating in the evaluation of cases and assisting in the evaluation of evidence and development of strategy.[171]

This conforms to the global trend, where the "overwhelming majority of firms adopting an alternative structure have been small firms."[172]

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[166] JAMIE S. GORELICK & MICHAEL TRAYNOR, FOR COMMENT: DISCUSSION PAPER ON ALTERNATIVE LAW PRACTICE STRUCTURES 1 (Dec. 2, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf.

[167] *Id.* As part of this undertaking, how lawyers in the United States should address the differences in rules applicable in different jurisdictions also was to be studied. *Id.*

[168] ISSUES PAPER, *supra* note 4, at 1 (alteration in original) (quoting ABA COMM'N ON ETHICS 20/20, PRELIMINARY ISSUES OUTLINE 6 (Nov. 19, 2009), http://www.americanbar.org/content/dam/aba/migrated/ethics2020/outline.authcheckdam.pdf).

[169] *See Id.*

[170] GORELICK & TRAYNOR, *supra* note 166, at 2.

[171] *Id.*

[172] ABA COMM'N ON ETHICS 20/20, DISCUSSION DRAFT FOR COMMENT: ALTERNATIVE LAW PRACTICE STRUCTURES 1 (Dec. 2, 2011), http://www.americanbar.org/content/dam/ (*continued*)

As the working group studied and evaluated alternative law practice structures, it identified five possible law practice formulations:

> A. Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership;[173]
>
> B. Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyer Ownership (The District of Columbia Approach);[174]
>
> C. Multidisciplinary Practices that Offer Both Legal and Non-Legal Services;[175]
>
> D. Limited Outside Investment in Law Firms;[176] and
>
> E. The Australian Model Permitting Public Trading of Shares in Law Firms.[177]

In February 2011, the structures of "limited outside investment in law firms" and "public trading of shares in law firms" were eliminated as

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aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf [hereinafter DISCUSSION DRAFT]. The District of Columbia has permitted nonlawyer ownership or management of law firms for over twenty years. *Id.* at 4. During the course of its study, "[t]he [w]orking [g]roup received anecdotal evidence that small firms in the District of Columbia find that being able to hold out the possibility of partnership to technology experts enables them to recruit and retain the nonlawyer experts they want, without compromising the independence of the firm or lawyer control." *Id.* Conversely, large firms "can often recruit and retain key nonlawyers as employees rather than as partners by providing salaries and bonuses comparable to the total compensation received by law partners." *Id.* at 7.

[173] *Id.* at 4. The firm would only engage in the practice of law and nonlawyers would be limited to a minority ownership percentage and required to pass a "fit to own" test. ISSUES PAPER, *supra* note 4, at 17.

[174] DISCUSSION DRAFT, *supra* note 172, at 4. Under this formulation, lawyers would be permitted to become partners and share fees with nonlawyers. *Id.* at 5.

[175] *Id.* at 4. The firm would be permitted to offer both legal and nonlegal services. ISSUES PAPER, *supra* note 4, at 19. There would be neither a limitation on nonlawyer ownership percentage nor a requirement that a fit-to-own test be passed. *See id.*

[176] DISCUSSION DRAFT, *supra* note 172, at 4. Under this formulation, nonlawyers who are not active members of a law firm would be permitted to invest in the firm, although there would be limitations on the percentage of ownership passive investors could have. ISSUES PAPER, *supra* note 4, at 19.

[177] DISCUSSION DRAFT, *supra* note 172, at 4. Under this formulation, nonlawyers who are not active members of a law firm would be permitted to invest in the firm with no limitation on ownership percentage. ISSUES PAPER, *supra* note 4, at 19.

viable possibilities.[178] While acknowledging that passive investment in law firms and public trading of shares in law firms were recognized in other countries,[179] Ethics 20/20 felt that they had "little track record, would depart sharply from U.S. traditions, and raised significant ethical concerns among Commission members and certain commentators."[180]

The working group continued to consider the three remaining law practice formulations and, in April 2011, sought feedback on these options from ABA entities, courts, bar associations, law schools, and individuals.[181] This resulted in the option on "multidisciplinary practice" being eliminated as a viable possibility in June 2011, although it was recognized that multidisciplinary practice, which offers both legal and nonlegal services, is "permitted in a number of countries in which U.S. lawyers and law firms engage in the practice of law."[182] Therefore, the working group "narrowed" its consideration to the following formulations: "limited lawyer/nonlawyer partnerships with a cap on nonlawyer ownership" and "lawyer/nonlawyer partnerships with no cap on nonlawyer ownership (the District of Columbia Approach)."[183] After further study and evaluation, Ethics 20/20 decided that the former of the two, the more modest and restrictive approach that resembles the legal disciplinary practice in England and Wales,[184] was preferable.[185]

In December 2011, Ethics 20/20 circulated a draft resolution for comment, which called for amending Model Rule 5.4 to permit nonlawyers employed by a law firm, who assist lawyers in the provision of legal services, to have a minority financial interest in the firm and share in its profits.[186] As in the District of Columbia, the resolution required "that the firm engage only in the practice of law."[187] However, it was more restrictive than the D.C. rules, as there were restrictions on the percentage of the firm a nonlawyer could own,[188] plus nonlawyers had to pass a fit-to-

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[178] DISCUSSION DRAFT, *supra* note 172, at 4.
[179] *Id.*
[180] *Id.*
[181] *See id.*; *see also* ISSUES PAPER, *supra* note 4, at 17.
[182] DISCUSSION DRAFT, *supra* note 172, at 5.
[183] *Id.* at 5–6.
[184] *Id.* at 13–14.
[185] *See id.* at 9.
[186] *Id.* at 2.
[187] *Id.* at 9.
[188] *Id.*

own test.[189] To offer "stronger protections consonant with the core professional values of the broader U.S. legal community,"[190] the discussion draft resolution of proposed Rule 5.4(b) provided as follows:

> Rule 5.4 Professional Independence of a Lawyer
>
> . . . .
>
> (b) A lawyer may practice law in a law firm in which individual nonlawyers in that firm hold a financial interest, but only if:
>
> (1) the firm's sole purpose is providing legal services to clients;
>
> (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
>
> (3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;
>
> (4) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under Rule 5.1;
>
> (5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;

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[189] *Id.*
[190] *Id.*

> (6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results; and
>
> (7) compliance with the foregoing conditions is set forth in writing.[191]

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[191] MODEL RULES OF PROF'L CONDUCT R. 5.4 (Discussion Draft 2011) (alteration in original), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf. Proposed comments to Draft Resolution Rule 5.4 provided as follows:

> [1] This Rule . . . limits sharing of legal fees with nonlawyers. Lawyers sharing legal fees with other lawyers not in the same firm is addressed by Rule 1.5(e). These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.
>
> [2] Paragraph (b) rejects an absolute prohibition against lawyers and nonlawyers sharing legal fees, but continues to impose traditional ethical requirements with respect to such fee sharing. Thus, a lawyer may practice law in a firm where nonlawyers hold a financial interest, but only if the requirements set forth in paragraphs (b)(1)–(7) are satisfied. The requirement of a writing helps insure that the other conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers have a financial interest.
>
> [3] Paragraph (b) does not permit an individual or entity to acquire all or any part of an interest in a law firm for investment or other purposes. Such an investor would not be an individual nonlawyer in the firm who performs services that assist the law firm in providing legal services under paragraph (b)(2). It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the profits of a law firm.
>
> [4] The term "individual" in paragraph (b) does not preclude the participation in a law firm by an individual professional corporation.

(*continued*)

[5] Paragraph (b) does not preclude a lawyer from providing "law-related services", as defined in Rule 5.7, whether through a law firm or other organization. A lawyer shall remain subject to the Rules of Professional Conduct with respect to his or her provision of law-related services pursuant to Rule 5.7 whether or not the entity through which the lawyer provides such services is a partnership or other form of organization in which a financial interest is held by nonlawyers pursuant to this Rule.

[6] Paragraph (b)(3) requires that all nonlawyers having a financial interest in a law firm state in writing that they have read and understand the Rules of Professional Conduct and agree to conform their conduct to the Rules. This accords with the requirement that a partner or lawyer with comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that all lawyers in the firm conform to the Rules. See Rule 5.1. Further, the requirement in paragraph (b)(6) that each lawyer having a financial interest in the firm shall make reasonable efforts to ensure that each individual nonlawyer having a financial interest in the firm is of good character is an ongoing obligation that does not terminate with the admission of the nonlawyer to the partnership or other organization through which the lawyer delivers legal services to clients. The ethical atmosphere of a firm can influence the conduct of all its members, and the lawyer partners may not assume that all those associated with the firm will inevitably conform to the Rules. See Rule 5.1 Comment 3. Due care must therefore be exercised by the lawyers having a financial interest or exercising managerial authority with respect to the admission to the firm of a nonlawyer whose character and fitness may reflect on the integrity of the firm and thereby on the legal profession. Whether a lawyer may be liable civilly or criminally for the conduct of a nonlawyer partner or member of the firm is a question of law beyond the scope of these Rules.

[7] To avoid possible conflicts between a lawyer's duties and those of a nonlawyer under the ethical rules or law applicable to their conduct, the law firm should not permit a nonlawyer to participate or continue to participate in a matter if the lawyer knows or reasonably should know that the legal or ethical duties of the nonlawyer are inconsistent with the duties of the lawyer or lawyers in the matter.

[8] For purposes of paragraph (b)(5), a financial interest in a law firm shall include, but not be limited to, an interest in the equity or profits of the firm. This provision provides that the nonlawyers cannot control the vote or veto a specific matter by reserving to the nonlawyers

(*continued*)

Feedback received on the discussion draft resolution was varied. Ethics 20/20 received more than two dozen comments,[192] and "[n]egative reactions outnumbered supportive ones by more than a two-to-one margin."[193] Some felt the proposed changes were "too modest,"[194] while others felt they were "too expansive."[195] In the end, Ethics 20/20 decided not to recommend that the ABA policy prohibiting nonlawyer ownership of law firms be changed: "Based on the Commission's extensive outreach, research, consultation, and the response of the profession, there does not appear to be a sufficient basis for recommending a change to the ABA policy on nonlawyer ownership of law firms."[196] It was determined "that the case had not been made for proceeding even with a form of nonlawyer ownership that is more limited than the D.C. model."[197]

> the right to approve or disapprove a specific matter when all lawyers vote to approve the matter.
>
> [9] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.
>
> [10] If a lawyer practices law in a partnership or other form of organization in which a financial interest is held by nonlawyers pursuant to this Rule, the lawyer, all such nonlawyers and the entity may be subject to registration or other requirements as may be determined by this jurisdiction.
>
> [11] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives conformed consent).

Id.

[192] Joan C. Rogers, *Ethics 20/20 Ditches Idea of Recommending Option for Nonlawyer Owners in Law Firms*, 28 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 250, 251 (2012).

[193] *Id.*

[194] Press Release, *supra* note 5 (internal quotation marks omitted).

[195] *Id.* (internal quotation marks omitted).

[196] *Id.* (internal quotation marks omitted).

[197] *Id.* (internal quotation marks omitted).

VI. THOSE IN FAVOR AND THOSE AGAINST THE DECISION NOT TO RECOMMEND NONLAWYER OWNERSHIP OF LAW FIRMS

The reaction of the bar to Ethics 20/20's decision not to recommend change to the ABA policy against nonlawyer ownership of law firms was mixed. Not surprisingly, withdrawal of the issue of nonlawyer ownership from consideration before the ABA House of Delegates had its proponents and its foes. Opponents to the change argued "that nonlawyer ownership is unnecessary, threatens the profession's core values[,] and will lead to external regulation of the legal profession."[198]

A. Opposition to Nonlawyer Ownership

Regarding the issue of necessity, it was asserted that "[t]he commission is proposing 'change for the sake of change alone,' without identifying any client-centered justification and without accounting for potential detriments that may flow from the change."[199] Others argued that "[t]here is no demonstrated need for the proposed change, and no reason to believe that clients will be better served by a profession that is open to nonlawyer ownership."[200]

Regarding the claim that nonlawyer ownership would present a threat to the profession's core values, opponents to the change targeted "the potential for interference with lawyers' independent judgment."[201] There is also "fear that the inevitable chipping away at the profession's professionalism ultimately will do a disservice not just to the business client[,] . . . but to all clients who seek the trusted and confidential advice of counsel."[202] It will "undermine the attorney-client relationship" and change "a firm from a group of like-minded attorneys zealously pursuing their clients' interest, into a group with inherently mixed motives and responsibility, where some partners have a professional duty to the client's interests and others do not."[203]

Fear that nonlawyer ownership will lead to the end of self-regulation was also a concern. Opponents to change claimed it would "diminish the profession's current judicially[]based system of regulation by expanding

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[198] Rogers, *supra* note 192, at 250.

[199] *Id.* (quoting a comment that the commissioners received from Douglas R. Richmond of Aon Professional Services, Chicago).

[200] *Id.* at 251.

[201] *Id.*

[202] *Id.* (quoting a joint letter sent by general counsels of major U.S. corporations).

[203] *Id.* (internal quotation marks omitted).

the scope of the professional regulation beyond its traditional focus on lawyers, thus making external regulation more likely."[204]

B. Proponents of Nonlawyer Ownership

Those in favor of change rue Ethics 20/20's decision not to put forth a recommendation advocating change, claiming outside ownership in law firms will "benefit consumers by enhancing competition and lowering costs."[205] "[E]xternal ownership [would] bring in competition and new ideas about product delivery, which will lead to better pricing, better access, and more transparency to the consumer."[206] In addition to benefiting consumers, it is contended that external ownership of law firms would "improve law firm governance, and boost U.S. law as an export business."[207]

Proponents of change also contend that there is already significant nonlawyer involvement in United States law firms and allowing nonlawyers "to become partners would regularize what is already happening."[208] With remuneration tied to firm performance, "many firms in the United States have nonlawyers in key positions, such as chief financial officers and chief operating officers, who are viewed as important parts of the management team and attend partners meetings."[209] Furthermore, by rejecting all approaches to nonlawyer ownership of law firms, Ethics 20/20 "shows a lack of confidence in lawyers[] being able to function in other environments, and ignores what would be useful to clients."[210] Additionally, proponents contend: "[T]o suggest that only lawyers have ethics is a bit insulting for the rest of society."[211]

C. Removing Nonlawyer Ownership from Discussion

In its statement to the public, Ethics 20/20 asserted that change to the ABA policy precluding nonlawyer ownership of law firms was not being put forward because it lacked a "sufficient basis for recommending

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[204] GORELICK & TRAYNOR, *supra* note 166, at 3.
[205] ISSUES PAPER, *supra* note 4, at 16.
[206] Rogers, *supra* note 192, at 252.
[207] *Id.* at 250.
[208] *Id.* at 252 (internal quotation marks omitted).
[209] *Id.*
[210] *Id.*
[211] *Id.* (internal quotation marks omitted).

change."[212] However, by deciding to pull back on the issue of nonlawyer law firm ownership, Ethics 20/20 prevented the question from coming before the ABA House of Delegates.[213] While noting that "[r]easonable minds can disagree about whether nonlawyers should be able to have an ownership interest in law firms,"[214] Andrew M. Perlman, Ethics 20/20's chief reporter,[215] stated: "[W]hat we saw was not reasonable disagreement . . . [but] entities within the ABA that did[no]t even want us to have the discussion."[216] Arguably, this is similar to the negative treatment the issue received when the MDP Commission recommended multidisciplinary practice in its report to the ABA House of Delegates in 2000.[217]

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[212] Press Release, *supra* note 5. In concluding that the case had not been made for a change in the existing policy on nonlawyer ownership of law firms, two choice-of-law questions were left, which arose from inconsistency among jurisdictions "with regard to the permissibility of nonlawyer owners and partners." ABA COMM'N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 8 (Feb. 2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf. "The first question concerned the permissibility of fee-sharing among lawyers in a single firm where the rules applicable to one of the firm's offices permit nonlawyer owners and the rules applicable to another of the firm's offices do not. The Commission announced in September 2012, that it had referred this issue to the ABA Standing Committee on Ethics and Professional Responsibility." *Id.* The second question, couched as "narrow and technical," concerned the permissibility of fee sharing among lawyers in a different firm in which the rules applicable to one firm prohibit nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers, and the rules applicable to the other firm permit such ownership and fee sharing. *Id.* at 9. "The consensus of the Commission was that . . . the authority to divide fees between those two independent firms currently exists in Model Rule 1.5." *Id.* (footnote omitted). The Commission noted that such a situation would be unlikely to arise because, in most instances, "two firms could send separate invoices to the client for their work in a matter." *Id.* But, "[g]iven the prior referral to the Ethics Committee, the Commission concluded that the Ethics Committee was in the best position to address this question." *Id.*

[213] ABA COMM'N ON ETHICS 20/20, *supra* note 212, at 9.

[214] Habte, *supra* note 15, at 283.

[215] *Id.*

[216] *Id.* This notwithstanding, Professor "Perelman expressed optimism that market forces may prod the legal establishment along and revive debate" on matters such as nonlawyer ownership of law firms. *Id.*

[217] Some argue: "There is no demonstrated need for the proposed change, and no reason to believe that clients will be better served by a profession that is open to nonlawyer ownership." Rogers, *supra* note 192, at 251.

So, what would constitute a "sufficient basis" for change? For that matter, what would constitute a sufficient basis to discuss the issue of nonlawyer ownership of law firms before the ABA House of Delegates? Those favoring the status quo say change is unnecessary.[218] They fear that change will threaten the core values of the profession and lead to loss of self-regulation.[219] Regarding "necessity," critics of change may be correct. However, just because alternative law practice structures may be unnecessary does not mean change would not be beneficial. For example, such change will be helpful to the public and small firms and can also make law firms in the United States more competitive in the international marketplace. Over the decades-long course of these discussions in the United States, it appears members of the public have been proponents of change to lawyers' current practice formulations.[220] Reportedly, restructured law practice formulations could benefit consumers, leading to increased competition and better pricing.[221] In addition, the small firms should not be overlooked, for they are the practice entities most likely to benefit from change. As borders shrink and business and finance becomes more global, the United States cannot afford to be left in the wake of the more progressive legal professions.

There is concern that new formulations of law firm ownership would be a threat to core values of the profession.[222] However, interestingly, this does not seem to be the case. Since permitting nonlawyer ownership or management of law firms in the District of Columbia more than two decades ago, "there have been no disciplinary cases involving interference with lawyers' professional judgment by nonlawyers."[223] Nor have any problems of this sort been reported with legal disciplinary partnerships that exist in England and Wales.[224] "There is simply no evidence that the perceived risk of interference has materialized."[225]

With the legal profession's "core values" seemingly intact with nonlawyer ownership of law firms, the fear that the profession will lose its self-regulated status is also unavailing. True, alternative law practice structures have led to the surrender of self-regulation in both Australia and

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[218] *See supra* Part VI.A.

[219] *See supra* notes 201–04 and accompanying text.

[220] *See supra* note 56.

[221] *See supra* notes 205–06 and accompanying text.

[222] Rogers, *supra* note 192, at 250.

[223] DISCUSSION DRAFT, *supra* note 172, at 6.

[224] *Id.* at 8–9.

[225] *Id.* at 6.

England and Wales.[226] However, in the United States today, there is already significant external regulation of the legal profession. "[M]any forms of law constrain the conduct of lawyers,"[227] such as the individual courts and federal and state legislatures.[228]

This notwithstanding, we have come to view "external regulation [as] an evil to be prevented or minimized,"[229] but in reality, self-regulation is a myth, in that external regulation is already happening.[230] To say additional external regulation would harm the legal profession or the public is pure conjecture. In fact, it may be beneficial to the community at large. For instance, the Legal Services Board of England and Wales, an independent and publicly accountable regulator,[231] sets consumer welfare and public interest as its preeminent concerns, rather than interests of the legal professions and their members.[232]

D. Recommendations to the ABA House of Delegates

In making recommendations to the ABA House of Delegates, Ethics 20/20 put forward proposed recommendations for revising the ABA Model Rules in September 2012 and February 2013. In 2012, Ethics 20/20 filed six sets of recommendations for consideration by the ABA House of Delegates in the following four categories: "outsourcing legal services; accommodating increased lawyer mobility; protecting client confidences with use of new technology; and using new technology for legal services marketing."[233] The ABA House of Delegates approved these recommendations at its August 2012 annual meeting with little or no opposition.[234] In February 2013, with a focus on foreign-licensed lawyers, a second set of proposed recommendations for revising the ABA Model

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[226] *See supra* notes 98–99, 151 and accompanying text.

[227] Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1150 (2009).

[228] *Id*. at 1147–48.

[229] *Id.* at 1180.

[230] *See id.*

[231] *See supra* text accompanying note 152.

[232] *See supra* text accompanying note 155.

[233] *Ethics 20/20 Group Submits Final Proposals for Vote by ABA Delegates at Annual Meeting*, 28 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 309 (2012) [hereinafter *20/20 Group Submits Final Proposals*].

[234] Rogers, *supra* note 16, at 509.

Rules also "breezed through the House [of Delegates]." [235] Apparently, unanimity was important to Ethics 20/20, with existing principles being embraced and contentious issues being avoided. For instance, one commentator was quoted as stating the following: "The standards for permissible virtual law practice they didn't touch. Nonlawyer ownership, they didn't touch. National licensure or uniform admission standards, really wasn't touched. And I think these were all deemed 'too hot to handle.'"[236]

It seems that ABA commissions tend to "define success" based on what recommendations and resolutions the ABA House of Delegates will accept.[237] Thomas D. Morgan, Professor of Law at George Washington University,[238] noted that this is the case "even if[,] by bringing a good idea before lawyers today, they may make later acceptance of an idea more likely."[239] Professor Morgan noted that some see the work of the MDP Commission at the turn of the century a failure,[240] as "it produced a report that was outstanding but proposed going further than the ABA delegates were prepared to go."[241] But, far from being a failure, "the MDP Commission succeeded in laying groundwork for changes in Great Britain, Australia, and potentially other parts of the world."[242] It has been noted that "the profession is moving a lot faster than the organized bar and regulators and the state courts are willing to accept."[243] However, even if

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[235] Joan C. Rogers, *ABA Approves Ethics 20/20 Proposals on Foreign Lawyers, Choice of Conflict Rules*, 29 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 101, 101 (2013). The resolutions considered at the February 2013 ABA midyear meeting focused on several discrete ethics-related issues arising out of globalization. *See id.* Choice-of-law problems associated with conflicts of interest, as well as the practice authority of foreign lawyers in the United States who are asked to advise clients on foreign or international law issues, were among the matters considered. *See id*. at 101–03.

[236] Habte, *supra* note 15, at 283 (quoting a statement made by Deborah A. Coleman of Hahn Loeser).

[237] Rogers, *supra* note 192, at 253 (attributing to Thomas D. Morgan, Professor of Law, George Washington University).

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] Habte, *supra* note 15, at 283 (quoting a statement from Myles V. Lynk, Professor of Law, Arizona State University School of Law, who chairs the ABA Standing Committee on Professional Discipline).

that is true, it stands to reason that informed discussion on alternative law practice structures is called for. Especially in light of the current international climate, avoiding the issue will not make it go away. Judging by the lack of problems that nonlawyer ownership has generated in jurisdictions in which it is embraced, it is difficult to see how deviation from the status quo would result in lack of protection for clients or the public. If anything, it appears that clinging to the status quo is less for the protection of the public, and more for the protection of the established bar.

VII. CONCLUSION

The approach of Ethics 20/20 has been referred to as "minimalist"[244] and the outcome as "disappointing."[245] Should Ethics 20/20 have pressed forward with the matter of nonlawyer ownership of law firms, opening discussion and putting the issue to a vote before the ABA House of Delegates? This author would give an affirmative response to that inquiry. Whether ultimately embraced, nonlawyer ownership of law firms is a matter that warrants open exchange.

While there was opposition from segments of the bar to altering the current law practice structure in the United States, other lawyers supported nonlawyer ownership of law firms.[246] Interestingly, the claims of the critics, emphasizing a threat to the core values of the profession and threats of losing self-regulation, really have no bite. Perhaps most interesting is the District of Columbia experience, where nonlawyer ownership of law firms has been recognized for over twenty years and there has been "no evidence of adverse consequences."[247]

It is significant to note that segments of the public are supportive of allowing nonlawyer ownership of law practices.[248] In fact, there is a dearth of public opposition to the matter.[249] A review of the colloquy surrounding the discussion reveals a focus on the interests of the legal profession and of individual lawyers, rather than on that of the community at large. Is the legal profession's resistance to nonlawyer ownership of law firms self-serving? Are lawyers protecting themselves or is it the interest of the

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[244] *20/20 Group Submits Final Proposals*, *supra* note 233, at 309.

[245] Habte, *supra* note 15, at 283 (attributing to Deborah A. Coleman of Hahn Loeser).

[246] *See supra* Part VI.A–B.

[247] DISCUSSION DRAFT, *supra* note 172, at 7. While a more recent experience, the same can be said of the LPD models in England and Wales, where, as of April 2011, no disciplinary problems had been reported. *Id.* at 12.

[248] *See supra* note 59 and accompanying text.

[249] *See supra* note 59 and accompanying text.

public that is the paramount concern? To this author, it seems likely the scale is tipped in favor of the former. Lawyers are attempting to protect themselves.